S. HRG. 98-217

THE SHIPPING ACT OF 1983

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 47 and S. 504 (Identical Bills)

BILLS TO IMPROVE THE INTERNATIONAL OCEAN COMMERCE TRANSPORTATION SYSTEM OF THE UNITED STATES

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THE SHIPPING ACT OF 1983

THURSDAY, FEBRUARY 17, 1983

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 1:15 p.m., in room SD 226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Present: Senators Thurmond and Metzenbaum.

Staff present: Marcy Tiffany, chief economist and counsel; Stephen Cannon, chief antitrust counsel; Deborah Shupe, research/investigator; Wesley Howard, minority counsel; and Margery Baker, minority chief counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

Today, the committee examines S. 47, the Shipping Act of 1983. This legislation, which was approved by the Commerce Committee last Tuesday, is intended to update and simplify the regulatory scheme for international liner shipping. As part of this effort, S. 47 attempts to clarify the application of our Federal antitrust laws to shipping activities.

The antitrust implications of S. 47 prompted our committee to seek sequential referral of this legislation. Before this bill is considered by the full Senate, it is this committee's duty to study it thoroughly and make certain that any changes in the application of the antitrust laws to the shipping industry will not be detrimental to consumers but, rather, in the public interest.

It is my intention that, following this hearing, the committee will work diligently to draft amendments it considers desirable to improve S. 47, and we will attempt to mark up the bill next Tuesday, February 22; that is, if amendments are needed.

Originally, the administration was scheduled to testify at this hearing. Unfortunately, the administration has requested to postpone their testimony. We expect to receive that testimony at a later time.

The committee is, however, grateful that such a broad array of distinguished witnesses could arrange to be with us this afternoon and we look forward to hearing their testimony.

Our first witness today is Mr. Thomas J. Campbell. First, I believe Senator Metzenbaum, the distinguished Senator from Ohio, has a comment.

OPENING STATEMENT OF SENATOR HOWARD METZENBAUM

Senator METZENBAUM. Mr. Chairman, I am pleased that today we are taking up S. 47, the Ocean Shipping Act of 1983. I want to say that I heartily commend you for insisting upon this committee's jurisdictional interest in this subject having to do with antitrust and providing for an antitrust exemption.

I must say regrettably that I do not think it is enough time, but I do appreciate your efforts. Without your strong voice and your efforts, I am certain that this committee's hearing would not have come to pass.

I appreciate this opportunity to hear from exporters, importers, and the ultimate consumers of shipping services. Mr. Chairman, in the last Congress—and, unfortunately, I expect again in this Congress—we heard from many industries that hoped that the key to prosperity lay in a special exemption from the antitrust laws. Cries came in from doctors and dentists, beer wholesalers, the National Football League, and the ocean shipping industry. All of them were with special pleas. All of them were for special treatment. All of them were with the same theme: Free enterprise and competition are fine, great, but don't make it applicable to us.

Fortunately for the American consumer, none of these special interests have been successful in persuading Congress to exempt them from the law yet, with the exception of several years ago when we passed the exemption for the bottlers industry.

Our focus today is on the claim by the ocean carrier industry that competition has reduced its profits. The carriers argue that the only solution is the blanket antitrust exemption contained in S. 47.

Before we begin, however, there are a few simple facts we should keep in mind. At this point, Mr. Chairman, with your permission, I will include in the record a statement of profits of the shipping industry to indicate that they are indeed not hurting but are doing extremely well.

The CHAIRMAN. Without objection, it will be inserted at this point.

[Material referred to follows:]

OPERATING REVENUES AND OPERATING INCOME FOR U.S.-FLAG LINERS: 1981

[In millions]

Corporation	Operating revenue	Operating income
Holiday Inns	$1,765	$291
Delta Lines subsidiary	413	46
R. J. Reynolds	11,692	1,500
Sea-Land subsidiary	1,623	103
LTV Corp.	7,511	625
Lykes Steamship subsidiary	457	27
Natomas	1,582	269
American President Lines subsidiary	632	38

Source: Moody's

Total net income for all U.S.-flag carriers:

Year:	Millions
1975	$141
1977	64
1978	106
1979	33
1980	160
1981	100
1975–78 average (excluding 1976)	104
1979–81 average	97

Source: Maritime Administrations.

Senator METZENBAUM. First, the General Accounting Office's report on this industry concluded that "the U.S. flag liner fleet has performed adequately and does not appear to be in a state of decline generally ascribed to it." That is the GAO. Indeed, the GAO study revealed that U.S. ships have increased their absolute and proportional share of cargo in recent years.

Second, this industry has succeeded in almost totally eliminating price competition. The very people who are the giants of American industry, some of whom do as much as $16 billion a year—not alone in the shipping industry but in the rest of their operations—those who talk most about defending the free enterprise system are in the forefront of the battle to attempt to eliminate free competition from the shipping industry.

The industry has, however, at this point almost totally eliminated that price competition, but it has vigorously engaged in service competition. But because many of these service aspects are costly, the carriers now seek to eliminate that element of competition as well. Thus, what would they do? They would have Congress provide a total antitrust exemption so that they cannot only charge monopolistic prices but reduce services as well.

As we have seen recently in the airline industry, competition works well in transportation industries to reduce prices. There is no reason that consumers of shipping services should be denied the benefit of lower prices or needed services.

I might say parenthetically that it is very difficult for this Senator to understand how people such as Ford Motor Co., can be supporting this legislation when Ford Motor Co. recognizes that the cost of shipping, as it goes up, has a direct impact upon their operations. I do not understand how they can be advocating legislation that would drive up prices.

Mr. Chairman, proponents of S. 47 claim that the measure only clarifies the existing antitrust law exemptions for the shipping industry. I say to that: Hogwash. It is not a clarification; it is a blanket exemption. In fact, the bill would almost totally eliminate competition in the maritime industry.

The existing law requires the Federal Maritime Commission to review each and every price fixing and other competitive agreement entered into by ocean carriers. The Federal Maritime Commission is empowered to grant antitrust immunity. When? Only if the agreement is in the public interest. And the Supreme Court has interpreted this public interest standard to mean that an exemption is warranted only if there is a special need shown that

outweighs the presumption that our antitrust laws are in the public interest.

S. 47, however, would provide a blanket immunity even if the FMC never reviewed the agreement. That is a far cry from case-by-case determination of anticompetitive effect.

Every time the ocean carrier industry has been examined, it has been found to be unworthy of self-regulation. The 1914 Alexander Committee, going all the way back 69 years, found a repeated pattern of predatory practices. Nearly 50 years later, the Celler Committee looked again and little had changed. Most recently, the Justice Department in a 1977 study showed that anticompetitive practices in shipping have continued unabated. Also, this study concluded that the FMC was either unwilling or unable to change the pattern.

Does not the 70-year history of this industry teach us a lesson about allowing our antitrust laws to be ignored?

Finally, Mr. Chairman, S. 47 would not even accomplish its primary purpose, which is to bolster the relative position of U.S. carriers in comparison with their foreign competitors. Ironically, S. 47 would primarily aid foreign vessels by helping the international carrier cartels increase their monopoly power. Under S. 47, American consumers would pay $3 billion in excess shipping costs to the cartels, 80 to 85 percent of the members of which are foreign firms.

In addition, S. 47 would eliminate crucial jobs in the maritime industry and divert traffic and revenue from all but the largest U.S. ports.

It would cost American workers jobs.

Can these effects possibly be in the best interests of American workers and consumers?

Mr. Chairman, I think it is rather interesting that as a matter of fact the House Republican Research Committee has addressed itself to this very issue. The Task Force on Congressional and Regulatory Reform of the House Republican Research Committee on July 14, 1982, said the following: In the U.S. maritime industry, more competition is needed. It went on to say: The administration's recently announced maritime shipping proposals appear to depart dramatically from recent procompetition approaches that have been pursued in other transportation areas. The new plan allows increased cartelization of the U.S. shipping industry by permitting operators flying the U.S. flag as well as foreign flags to act collectively, free from antitrust scrutiny. Indirect subsidies are effectively increased under the policy. Ship operators would continue to receive direct subsidies. However, a second, nonbudgeted advantage for U.S. carriers would come from permitting groups of them to set higher than competitive rates for their services.

The House Republican Research Committee went on to say: As President Reagan acknowledges, our strong merchant marine is a vital economic instrument for the support of U.S. interests abroad. However, increased cartelization in order to strengthen the U.S. shipping industry can have serious economic consequences. Exporters, importers, and consumers are likely to bear the brunt of less competitive policies through higher transportation and product costs. The international shipping industry is now increasingly competitive. More, not less, of a free-market approach should be consid-

ered to insure a viable U.S. merchant marine and to offer the public high quality liner service at the lowest possible price.

That is from the House Republican Research Committee.

Mr. Chairman, I would also like to comment about the manner in which this bill is being handled in the U.S. Senate.

I am particularly pleased that, by reason of your efforts, it has been referred to this committee for all of 6 days. Had you not been in a leadership role, it would not have come for that long. You and I had agreed at an early point and others on this committee had agreed that 15 days was a very modest number of days. But, no, they were so determined to push and push and push that they limited it to 6 days. But those who are the proponents were not even satisfied then. They wanted to be certain that they had all the cards stacked in their favor. So, what did they do? A very unusual procedure: They reported out two bills; one without a number and one, S. 47. What goes on? What is the pressure on this particular measure? Why are the lobbyists so concerned? Who is behind all of these maneuvers to see to it that the Judiciary Committee be limited in the time that it has to examine into this measure and as well to be certain that a bill still remains at the desk while we have jurisdiction of the identical companion measure?

I might also say, Mr. Chairman, that I believe that the head of the Antitrust Division, Mr. Baxter, belongs before this committee. It is my understanding that he had intended to come. It is my further understanding that the administration indicated that he was not to be here.

I think this committee is entitled before markup and even if we need additional time, to have Mr. Baxter address himself to the issues in connection with this pending legislation.

Mr. Chairman, I am very grateful to you for your leadership and for your efforts. I am looking forward to the testimony of the witnesses here today. Thank you.

The CHAIRMAN. I might say with regard to Mr. Baxter, he was invited. He plans to attend. However, the administration took the position they should speak with one voice. They do have an attorney from the Transportation Department who will testify tomorrow. If he does not testify tomorrow, he will testify on another date.

Now, Mr. Thomas J. Campbell is here. He is Director of the Bureau of Competition of the Federal Trade Commission. Mr. Campbell, you may proceed.

STATEMENT OF THOMAS J. CAMPBELL, DIRECTOR, BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION

Mr. CAMPBELL. Mr. Chairman, the printed testimony I present today, I wish to make clear, has the approval of the Federal Trade Commission. The commission itself considered this testimony and has unanimously authorized me to present this testimony as their own. I note this distinction in order to draw attention to the fact that the unanimous commission composed of commissioners appointed by different Presidents speaks with one voice in the positions that are stated in my written submission today.

I must also state at the start that I speak as the Director of the Bureau of Competition from the perspective of antitrust. In my view, antitrust served to protect the protection of the consumer, to guarantee that prices are kept low and that product is kept in large supply.

I must be candid to recognize other goals as well that perhaps are important in considering this legislation. My main point today is to urge upon the Congress that, to the extent these other goals are to be taken into account, as much competition as possible be preserved.

I also wish to state at the start that there is much that is good in this bill. The Federal Maritime Commission is to be applauded for attempting to streamline their procedures, the 45 days, for example, for consideration of possible problems with tariff filings, the maximum of 180 days for full investigation.

Under the chairmanship of Alan Green, the improvements in the efficiency and predictability of the Federal Maritime Commission certainly must be applauded.

Let me return then to the question of overall goal. Two suggested goals have been proposed for this legislation. The first is to place U.S. carriers on the same terms as foreign carriers. To me, this is a very strange premise. If we wish to improve the competitive position of U.S. carriers, then we would urge them to lower their price and to expand their output, not to lift their price or restrict their output.

Competition, in my belief, thrives best on lower prices and not on agreements among competitors.

However, if some effort is necessary to allow U.S. carriers to enter into agreements, cartels with foreign carriers, then I urge upon this committee to consider who benefits and who hurts. The benefits would surely go in a predominate share to those members of the foreign cartels who will do the predominate share of the shipping, namely foreign carriers; and the harm would be to the American consumer.

A second goal has been suggested. That is to create certainty. Again, Chairman Green is to be applauded for pursuing this goal at the Federal Maritime Commission. However, it is not my view that any more certainty is required in this industry than in any other industry which is subject to the antitrust laws of the United States. Admittedly, courts interpret our antitrust laws in sometimes varying ways, but the broad outline and the prescriptions of those laws are clear enough; and they work for all other forms of commerce.

I do not understand why they should not work as well here.

Furthermore, to argue that it is necessary to eliminate uncertainty does not win the point because what is being proposed is to eliminate antitrust. Indeed, one could argue that it improves certainty to eliminate the Sherman Act. If Sherman section 1, which is a statute quite broad in scope, were eliminated, things would be more certain. But I believe this goes too far, and the interests of the consumer must be balanced as well.

From that opening perspective, I would like to address several individual parts of this bill where I believe, if some antitrust immunity is desirable for whatever goals there might be other than the

protection of the consumer, we can at least tailor the provisions of the bill so that they do not do any more harm than the bill necessarily entails. My goal today is not to criticize so much as to offer language in the interest of protecting the American consumer.

MARINE TERMINALS

The first point I would address specifically is the antitrust exemption for marine terminal operators to be allowed under section 4 of the bill. Let me note at the start that this, at least on its face, has nothing to do with ocean carriage. It strikes me as a me-too provision. Far too broad in its scope, the provision, as it appears in the present bill, would grant antitrust exemption to agreements among marine terminal operators—and I quote—"to pool or apportion earnings, losses, or traffic."

Our suggestion would be to limit the antitrust immunity, if we must have antitrust immunity, only to the precise purpose which I understood the bill was to address, the carriage of trade in foreign commerce. So, if agreements among marine terminal operators are necessary, insofar as they might deal with a conference, then perhaps that would be appropriate, but no more.

As to pooling, it strikes me as passing strange that, whereas pooling is regulated for carriers themselves, here, when it appears for marine terminal operators, there is no limitation and no supervision by the Federal Maritime Commission.

On this point I conclude with one final observation. It strikes me as particularly pernicious that marine terminal operators might be permitted to gather and agree without any boundary to the limits of that agreement so that even smaller ports might become the victims of agreements. It is not unreasonable, if antitrust immunity is granted to those terminal operators in large cities, that they would seek to use that immunity to exclude competition from smaller port cities. I believe the Senate and the House should bear that in mind.

SHIPPERS' COUNCILS

The second specific point concerns shippers' councils. The rationale here is that, since we are creating a cartel for ocean carriers, we will need a cartel for the shippers. Again, that strikes me as a very strange rationale. If we admit there is harm from the cartel, then I would urge we not have the cartel or limit it. Instead, this bill proposes to offer another layer or agreement between competitors.

Even if that were a worthy purpose, the language as proposed is far too broad. I again quote from the proposed legislation—section 4(c)(3)—that shippers' councils be permitted "to agree upon common positions."

As an administrator of the antitrust laws, I am familiar with what those subject to the antitrust laws argue is not subject to the antitrust laws. With language as broad as this, I can conceive of someone arguing that an agreement among shippers 'councils to fix prices to final customers without any involvement of the ocean carriers would be an agreement "upon a common position."

The suggestion I would make, so that I am not entirely negative but to offer a constructive element, would be to allow this, if we must, but only insofar as needed for the shippers to deal with the carriers, and not to have as broad authority as this language presently represents.

INTERMODAL TRANSPORT

The third specific point is intermodal transport. I do not perceive the justification that this is a necessary part of allowing U.S. carriers to participate in foreign cartels. Rather, I hear the argument raised that this is necessary for efficiency in order to quote a single through rate. The risk from such a practice, though, appears to be admitted even by the draftsmen of this bill, judging from the large number of safeguards that are introduced into this bill—as though one knew that this would be an area full of potential for anticompetitive conduct. There are provisions such as that conferences may not bargain with inland carriers, or that conferences themselves may not set the division between carriers and inland carriers on through rates.

Let me speak to the anticompetitive harm involved in this provision.

It is classical economics that the consumer is harmed the greater the proportion of the value of any good within the control of someone with market power. If a monopoly has a provision only over a certain part of the final delivered value, that is harm enough. But the larger expanded share it has over the final delivered value, the greater the harm. Accordingly, it is perfectly possible, as I read this legislation, for an agreement among the intermodal and individual members of a conference to abide by a single monopoly price for the carriage of goods.

To say to this that the shippers can bargain with the carriers strikes me as not taking into account the one who actually pays. What difference does it make to the consumer if the truck carrier or the ocean carrier has a higher or lower percentage of the monopoly price? It is still a monopoly price. And it is to this that I would raise an objection.

If we cannot remove that provision entirely, then let us try some creative solutions to limit the possibly pernicious effect. The first would surely be to prohibit those agreements with intermodal carriers where the purpose or effect would be to eliminate competition in the inland carriage. This could be added to the list of prohibited acts.

A second possible modification would be to allow a right of independent action so that, even if it were permissible for carriers to agree in the conference that they would have a single through rate, there would be no penalty for an individual who chose, in the interest of a lower price, to depart from that through rate.

POOLING

A fourth point is pooling. There is clear anticompetitive harm, it seems to me, from permitting revenue pooling. It takes away the incentive to cut price and to increase share by any individual competitor. There is, furthermore, the risk that pooling would be used

to reward an individual carrier who would attempt to use the right of independent action against a cost cutter. A conference could agree that the response to a carrier who cuts cost will be that one of that conference will meet that competition and drive out the cost cutter. And then all the other members of the conference will participate through pooling so that that individual is not damaged.

The safeguards that are proposed in the amendments recently passed by the Commerce Committee do not, in my judgment, completely solve the problem. The first is that the Federal Maritime Commission is given authority to consider whether pooling should be allowed and to weigh efficiency in such a determination.

It strikes me that harm to consumers ought to be in there someplace and that it is a most difficult weighing to determine how much harm to consumers should be permitted in order to allow so much efficiency.

The second point strikes me as even more strange, that the Federal Maritime Commission is to weigh foreign policy concerns. If this is to mean what it says, then I for one do not know under what standards the Federal Maritime Commission would weigh the harm to competition against a foreign policy objective of the United States nor what structures they have for making those determinations. I suspect, though, that it might not work the way that it appears but, rather, serve as a very large loophole so that, whenever a foreign policy interest is expressed, the pooling arrangement is permitted.

To attempt a constructive suggestion, at the least, I propose that pooling should be denied where its purpose is to compensate the exercise of the right of independent action. In that area, it strikes me, there is the most potential for harm if we may not eliminate pooling entirely.

LOYALITY CONTRACTS

The fifth point is the loyalty contract. The loyalty contract might be better than a deferred rebate, but it is still a way of tying services to customers; and it is unrelated to lowering cost or lowering delivered price. Tying is more troubling under standard antitrust theory and economic theory as well, the smaller the opportunity for the original choice. So, if the original choice is limited, then the tied good comes along, and you do not have the opportunity not to take it.

Senator METZENBAUM. Would you just explain tying a little bit?

Mr. CAMPBELL. By all means, Senator. Under standard antitrust law, and particularly in the Clayton Act, there is a prohibition on the tying of one good to another where the effect may be to damage competition.

A classic example—and I do not mean to cast aspersion on this particular industry—would be a manufacturer of a radio who say you can buy our radio but you also must buy our batteries. This is more harmful to competition if there is a monopoly in radios because then you really have no choice. My point in this context is that tying is effected through a loyalty contract. Once a shipper has dealt with a particular carrier, is given the requirement under a tie-in contract to come back to that carrier. And this is more per-

nicious and more damaging the less choice one has up front, which is precisely the intent of this bill. It is for the purpose of creating a cartel, namely, to limit that initial choice of carrier.

The last point I would make on loyalty contracts is that it is strange to see this provision at a time when foreign competitors—equality with whom is supposed to be the rationale for the bill—are retreating from loyalty contracts.

To offer a partial solution, at the least we should not permit loyalty contracts for 100 percent of the carriage but, rather, take the model that has been developing in several of our trading partners and set a maximum, that only so much of the carriage can be permitted to come under a tying arrangement. Another improvement would be to allow for those who wish to depart from a loyalty contract to be judged under the standard element of proof. This bill creates a presumption that one who challenges an individual company for violating a loyalty contract is correct, and the burden of proof is to prove that he did not. This is contrary to the standard burden of proof in antitrust and in jurisprudence more generally, as this committee surely knows.

Those at least would be two solutions if we must have the provision for loyalty contracts.

FMC'S AUTHORITY TO GRANT EXEMPTIONS

My last point deals with the broad exemption authority given to the Federal Maritime Commission. The exemption authority is provided in an amendment to section 18 which just passed the Commerce Committee. The exemption would cover all aspects of—the FMC would be permitted to exempt from the requirements of all aspects of the act. The only requirement would be for the Federal Maritime Commission to make an assessment that the exemption will not substantially impair effective regulation by the FMC.

This is particularly troublesome. To whatever extent there are protections in this bill, the FMC now is given quite a broad charter to exempt from those protections. And this is troublesome especially in view of the newly amended language to section 8 which just passed the Commerce Committee, which grants antitrust immunity to any activity undertaken in the reasonable belief that that activity was exempt under section 18.

Our view as prosecutors under the antitrust laws is that a good-faith standard is very difficult to work with and that, if the conduct of which we speak is going to hurt consumers, as we believe it will, then it should be made to fit within the four corners of the exemption provided and not be the subject of a very general grant of good-faith exemption.

A partial solution might be, if the Federal Maritime Commission is to grant exemptions, then at least it be obliged to consider competition before it grants those exemptions. I would urge that the exemption be allowed only if FMC were sure that competition would not thereby be lessened.

PUBLIC FILING AND ENFORCEMENT OF TARIFFS

Those conclude my points on the specific aspects except for one which is quite an important one dealing with the public filing and enforcement of tariffs.

There are two aspects: The posting of tariffs and the enforcement of tariffs. The Congress should know that the United States would, in adopting this legislation, join only two other countries, Canada and Japan, in having an arm of the government enforce cartel tariff agreements. None of the European trading partners have them. So, to whatever extent the argument is that such a provision is necessary to help us come to the same footing as our European trading partners, I do not see why an arm of the Federal Government should be involved in enforcing prices fixed by this cartel. Let the cartel enforce its own prices if we must have a cartel.

As for posting, there is an argument raised that perhaps posting is beneficial so that the Federal Maritime Commission can prevent discrimination. On this point, I do not believe it is necessary to do so, in that discrimination laws exist in the antitrust field, Robinson-Patman in particular, administered by the Federal Trade Commission, where we do not have the obligation to file prices. And I would point out the possibly anticompetitive effect of having posted tariffs, because then every cartel will know what every other cartel is charging for the same carriage, and the possibility of further collusion even between cartels is furthered.

In sum, in each of these seven specific areas I have attempted to isolate particular problems, not so much to criticize as to suggest that we can do a better job than this present draft. In marine terminals, shippers' councils, intermodal, pooling, loyalty contracts, the exemption authority of the FMC, and in the publication and enforcement of tariffs, there is more harm resulting to consumers than is necessary to achieve the objects of this act.

You will hear from representatives of many points of view. In the structure of this bill, we have representation for the Federal Maritime Commission, for shippers, and for carriers, but we do not have representation for the American consumer. The American consumer looks to the Members of the Congress, their elected representatives, to watch out for their interests as, in my view, they also look to the Federal Trade Commission. I hope that we can see with one view the need for change in this proposal. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Campbell, your remarks which you made available to the committee will be inserted into the record, without objection.

Mr. Campbell, I have a few questions. I do want to say that I am not prejudiced against this bill. I am seeking the truth. From what the staff has told me, there are some portions of this bill that they feel are not in the best interests of the public. I am just seeking the truth.

What, if any, justification is there for the provisions in this bill requiring tariff filing and enforcement?

Mr. CAMPBELL. As I understand it, Mr. Chairman, the purpose would be to allow the Federal Maritime Commission to police tar-

iffs and thus eliminate the possibility of discrimination by carriers against individual——

The CHAIRMAN. Please speak louder.

Mr. CAMPBELL. As I understand it, the rationale is to allow the Federal Maritime Commission through observation and enforcement to prohibit discrimination by carriers against individual shippers.

Senator METZENBAUM. Or in favor.

Mr. CAMPBELL. Correct.

The CHAIRMAN. Do they work to do that?

Mr. CAMPBELL. Do they wait?

The CHAIRMAN. Work, w-o-r-k.

Mr. CAMPBELL. In my view, no, sir. The possibility for discrimination still exists by establishing tariffs which, in practical effect, offer lower prices to larger shippers through requirements that only larger shippers can meet.

The CHAIRMAN. Mr. Campbell, would you recommend that tariff filings and enforcement provisions be amended out of this bill?

Mr. CAMPBELL. I would.

The CHAIRMAN. Mr. Campbell, section 4(c) of the bill authorizes the formulation of shippers' councils. Can you explain what is the purpose and function of such councils?

Mr. CAMPBELL. As I understand it, Mr. Chairman, such councils have a purpose only if there is a cartel of carriers. Shippers deal with carriers. If there is a cartel on one side, the argument runs, there is no additional harm to having a cartel on the other side. This strikes me as an insufficient rationale if we do not have the carriers' cartel. Second, even if we do, there are instances when two levels of cartel can result in even more restriction of product and higher price than if there had only been one.

The CHAIRMAN. Mr. Campbell, if the Senate were to follow your suggestion of not requiring tariff filing and enforcement, would this lessen the need and justification of shippers' councils?

Mr. CAMPBELL. It would, Mr. Chairman, entirely. To the extent that there was not tariff filing and enforcement, there would be very little way of effectively patroling the carriers' cartel. And without a carriers' cartel, there is no reason for a shippers' cartel.

The CHAIRMAN. Mr. Campbell, section 4(a)(2) of the bill permits carriers to pool or apportion traffic revenues, net losses or net profits. Would you explain the justification for these types of pooling arrangements?

Mr. CAMPBELL. In part, the explanation, as I understand it, is that, when carriers allocate revenues, they are compensating for the individual carrier who might not have received as favorable a route during that time period as another, and thereby they are guaranteeing a minimum rate of return for that carriage.

The CHAIRMAN. Mr. Campbell, is it possible that revenue pooling could be misused to achieve an anticompetitive result?

Mr. CAMPBELL. In my view, Mr. Chairman, there is no doubt about it. One example that comes to mind at the first is that an individual who is engaged in punishing a price cutter would be supported through revenue pooling in order to meet and defeat that price cutter. This is a serious risk.

The CHAIRMAN. Do you think this bill would be improved if it had some mechanism for distinguishing between situations when revenue pooling would be desirable and when it is being misused?

Mr. CAMPBELL. I do. At the very least, the Federal Maritime Commission, which is given authority to review pooling arrangements, ought to be obliged to consider competition in the consumer's interest. That is not in the bill as drafted. So, the distinctions as to when pooling arrangements are allowed and when they are not do not drawn upon that factor.

The CHAIRMAN. Mr. Campbell, the bill as it presently stands would grant immunity for interconference agreements. Do you see any justification for this? Do you see any problems that it creates from a competitive standpoint?

Mr. CAMPBELL. I see little justification for it, and I do see competitive problems with it, Mr. Chairman. The interconference agreement allows cartels to cartelize. It allows those who have already eliminated competition among themselves to agree further to eliminate competition between other similarly situated groups. If there is a need to allow U.S. carriers to enter foreign cartels, that is one thing. But to say that then those cartels shall be permitted to agree with other cartels is only to expand the possibility of price uniformity and, I suggest, lifting price to the detriment of consumers and competition.

The CHAIRMAN. Mr. Campbell, in addition to liners, sea cargo is carried by tramp steamers and bulk cargo carriers; yet, these carriers have no antitrust exemptions. Do you think that the liner carriers are so different from these other types of carriers as to justify such extension of antitrust exemptions as this bill contains?

Mr. CAMPBELL. I will necessarily admit that I am not such an expert in that area as to give a direct answer. I will offer to be helpful, though, with this one observation. There is one premise for this bill argued in the existence of foreign conferences for liner shipping. To the extent that those exist and American shipping is attempting to enter into them, the situation might be different than for tramp and other steamers and other shipping methods.

However, from the area where I do have some expertise, antitrust, I can say that I am quite suspicious of that sort of distinction being a justification for an antitrust immunity.

The CHAIRMAN. Mr. Campbell, section 4(a)(3) of this bill permits conferences to set rates for through transportation. Does this mean that they may not only fix their own rates but that of rail and truck carriers as well?

Mr. CAMPBELL. It does, Mr. Chairman. This allows the monopoly power permitted for the ocean carrier to be extended backward to any sort of transportation that connects with the ocean carrier. It strikes me that it does extend the monopoly power.

The CHAIRMAN. Do you think this practice might tend to extend price fixing activities to the trucking industry with respect to other areas in which truckers operate?

Mr. CAMPBELL. I believe that is a serious risk. The reason is that individual truckers will have a means of communicating price information to a common unit, the ocean carrier conference. To the extent that that is used as a means of stabilizing price, it could be a collusion facilitating practice in that industry as well.

The CHAIRMAN. Mr. Campbell, I am concerned about the effect this legislation might have on small ports such as Charleston, S.C., or Mobile, Ala. Let me read from an article that appeared in the Journal of Commerce on Wednesday, September 22, 1982:

> As container ships grow larger in size, the carriers may decide to call at only one or two ports along the Atlantic Coast rather than five or six, as is often the case today, with unit trains running from Atlanta to Norfolk, and completely bypassing the smaller ports from Florida through North Carolina.

The question is, do you think this provision in section 4(a)(3) of this bill that permits carrier conferences to allot ports or restrict sailing between ports, together with the exemption for agreements with marine terminal operators, might aggravate this problem?

Mr. CAMPBELL. I do, Mr. Chairman. The opportunity exists through the provision that you cite for a conference to restrict the total amount of carriage. Indeed, that is why the conference exists, to limit the amount of carriage of goods. It follows necessarily that some ports are going to suffer and others are going to gain, or at least maintain their present volume. It cannot be that every port gains because there is less being carried. Since the carriers are going to be permitted to agree, it is very likely that one of the elements of agreement will be the ports that are served.

Let me note as well, Mr. Chairman, the provision of the bill that deals with marine terminal operators, who are also given an antitrust exemption. If, through the course of this antitrust exemption, they are able to extract an agreement with a particular carriers' conference, that that conference will receive favorable treatment at that port or terminal so long as none of the conference's goods go elsewhere, there would again be possible harm to the smaller ports.

The CHAIRMAN. Mr. Campbell, do you think it likely that the provisions in this bill will result in higher shipping prices?

Mr. CAMPBELL. I cannot conceive of any other result, Mr. Chairman.

The CHAIRMAN. To the extent that higher shipping prices will result, what effect will this have on the American consumer?

Mr. CAMPBELL. Again, I must admit that my expertise would not allow as definitive an answer as this committee would like, but I could at least offer the direction to be pointed in, which would be to ascertain what the delivered value of American consumer goods is and how much of that value is accounted for by ocean shipping. And that portion is the factor that will be aggravated by the immunity proposed in this bill.

The CHAIRMAN. Mr. Campbell, I understand that 80 to 85 percent of the membership of the ocean shipping conferences consists of foreign carriers. Will this not mean that, while American consumers will have to foot the whole bill for increased shipping costs that result from this legislation, only 15 to 20 percent of each additional dollar they have to pay will go to American carriers, with a larger part going to foreign carriers?

Mr. CAMPBELL. That is quite true, Mr. Chairman. Not only is that statistic correct, but one could anticipate the percentage going to American carriers to diminish rather than grow. The rationale is that less carriage is resulting. American ships will be carrying less. So, even that 15 or 20 percent might be too high an estimate.

One thing is sure. The 100-percent cost to the American consumer is without question. It is the American consumer who will be paying.

The CHAIRMAN. Have you made, or will you make in the additional supplement you make to your testimony, the specific recommendations that you feel should be made to protect the public in this bill if it passes?

Mr. CAMPBELL. It will be my pleasure, Mr. Chairman, to draw together the suggestions that I have presented and to furnish those to the committee.

The CHAIRMAN. And get those to the staff for consideration?

Mr. CAMPBELL. Yes, sir.

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. Mr. Campbell, let me first commend you on the quality of your testimony, which I consider to be excellent. Mr. Chairman, let me commend you for your incisive questions which I think in particular opened the arena to exactly what the impact of this legislation will be.

I have a couple of questions. I am frank to say that the chairman has done an equally superb job to that of our witness today.

I understand, Mr. Campbell, that the chairman and the newest Commissioner of the FTC, George Douglas, are strong proponents of transportation deregulation. Specifically, I understand they have argued for antitrust to apply to the deregulated airline industry.

Do you see any important distinction for antitrust purposes between the airline and the shipping industries?

Mr. CAMPBELL. I will be frank to say that those two individuals are quite expert in the areas, and I do not have their expertise. But you are kind to ask my view, and I will share it.

I do not see any difference for antitrust purposes. The reasoning which those two individuals, and the Federal Trade Commission, through its intervention activity, have been urging for deregulation and fewer restrictions on transportation applies with equal force to maritime as it would to airline and to trucking.

I would offer just one final ironic note. How strange it is to see the intermodal aspect of this bill as a potential for undoing some of that progress.

Senator METZENBAUM. Mr. Campbell, let us take a hypothetical case where pooling is permitted. There are 20 carriers who are pooling. Under this bill, any individual company may go out and not join the cartel. And they may provide competition.

Under pooling, is it not the fact that the pooled funds could then be arranged in such a manner that those who are doing the pooling would say to one of their carriers, you go out and low-ball; you cutthroat the competition with respect to that one fellow who is not in our pool and our cartel? And we will see to it, because you are sharing the pool funds, that he will be driven out of business or we will drive him into the cartel.

Is that not the way it would work?

Mr. CAMPBELL. I believe it would, Senator. I must note that there is a prohibition against fighting ships, one very narrow, possible means of accomplishing this. So, at least the use of a fighting ship, namely, one ship designated particularly for the purpose of driving out that competitor, is not allowed.

Once you are beyond that, any other means would be possible. And the cross-subsidization, the choice of a champion to address the price cutter and teach him a lesson, is without restraint, as I read this bill.

Senator METZENBAUM. As a matter of fact, when you have a pooling arrangement, if there are shippers who are not part of the shippers' cartel, they, too, can be discriminated for or discriminated against. Is that not the fact?

Mr. CAMPBELL. That is my belief; yes, sir.

Senator METZENBAUM. As a practical matter, is not it the fact that American autos, American steel, American farm products, almost every single segment of the American economy that has any relationship to imports or exports would wind up bearing a higher price tag by reason of the passage of this bill?

Mr. CAMPBELL. I think that is an accurate conclusion.

Senator METZENBAUM. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Campbell, thank you for your appearance here today and the contribution you made to the hearing.

Mr. CAMPBELL. Thank you, Mr. Chairman.

The CHAIRMAN. You are now excused.

Senator METZENBAUM. Mr. Campbell, could we ask you to accelerate your schedule to see that your revised statement gets back to us possibly by Monday?

Mr. CAMPBELL. I will do my very best.

Senator METZENBAUM. Tuesday? This bill was scheduled to come to the floor on Wednesday, and I might want to quote from it.

Mr. CAMPBELL. In that connection, let me say that the written statement I have submitted accurately reflects the unanimous approval of the Federal Trade Commission. So, what you have now you can use. What additional points I might offer I would, of course, submit to the Commission, if it is to be ascribed to them. If there is a delay, at least you will have what I have already submitted.

The CHAIRMAN. On the additional points you are going to offer, I presume you will get the concurrence of the Federal Trade Commission on those?

Mr. CAMPBELL. Yes, Mr. Chairman.

The CHAIRMAN. So, you will be speaking for the full Commission?

Mr. CAMPBELL. The views that I expressed today that were in addition to the formal submitted statement were views that I present as Director of the Bureau of Competition. Because there were late changes, I did not have those before the Federal Trade Commission.

The CHAIRMAN. Thank you.

Mr. CAMPBELL. Thank you, Mr. Chairman.

[Prepared statement of Thomas J. Campbell follows:]

Statement of Thomas J. Campbell,
Director, Bureau of Competition,
Federal Trade Commission,
on S. 47, Shipping Act of 1983.

Mr. Chairman and members of the subcommittee: I am most pleased to present today the views which the Federal Trade Commission has authorized me to express concerning the Shipping Act of 1983. At the very first, let me explain that I speak from the point of view of the Bureau of Competition, the antitrust enforcement arm of the Federal Trade Commission. If I have criticisms of the bill, therefore, it is because the mission of the Bureau of Competition is to protect the American consumer from the harms of market power manifest through collusion, monopoly, and other market abuses. I acknowledge, however, that there are other important considerations that must bear analysis in debating this bill; and as to those additional concerns unrelated to competition, I am not competent to express any opinion.

One additional introductory comment is necessary. As one familiar with an independent federal agency engaged in law enforcement, I recognize the difficulty presented to individual citizens, companies, and other organizations from excessive delay and uncertainty. It has been our goal at the Federal Trade Commission to eliminate delay as much as possible and increase the predictability of what we do. From this perspective, I must express my admiration for the job Chairman Alan Green is doing at the Federal Maritime Commission. The proposals in this bill to shorten the time for FMC review, and to set a 180 day maximum for full scale adjudication of contested issues under this act, represent a model effort at administrative reform. It is typical of Chairman Green that these would be priorities of his administration at the Federal Maritime Commission. And this observation is also useful in demonstrating that there is much in this bill that is beneficial, and which should be supported. The

somewhat critical tone that I will adopt in what I say today must be tempered with this realization, as well as by the recognition that my perspective is limited only to preserving or improving competition in this industry.

The Federal Trade Commission has for some time been concerned about competition in the transportation industries. In years past, the Commission and its Bureaus of Competition, Economics and Consumer Protection have worked with, and appeared before, regulatory agencies such as the CAB and the ICC, as well as with the Congress, in promoting competition in airline, truck and rail transportation. In the last Congress, the Director of the Bureau of Economics and I presented views on an earlier version of this ocean shipping legislation, H.R. 4374, to the House Judiciary Committee Subcommittee on Monopolies and Commercial Law.

There is a long history of formal efforts to eliminate effective competition in ocean liner shipping. Further reduction or elimination of effective competition in liner shipping would be extremely unfortunate. The result would be to deny to U.S. exporters and importers, and ultimately U.S. consumers as well, the economic benefits of a competitive marketplace. The liner conferences may be viewed as classic cartels, attempting to eliminate competition and obtain for themselves the benefits of monopoly power. The economic justifications advanced for the conference-cartel system are not convincing. A more competitive market environment could almost certainly provide shippers and consumers with the benefits of desirable efficiencies at a lower cost than under a cartel system.

Thus, we are very concerned about the bill's proposal to abandon almost completely antitrust enforcement in this industry. The antitrust laws are this country's primary means of preserving the economic and consumer benefits of competition. Without antitrust oversight, will market forces and the remaining regulatory structure be sufficient to assure as many of the

benefits of competition as possible in the ocean liner industry? My concern is increased by the bill's proposal to eliminate the "public interest" and "detriment to United States commerce" standards, thus reducing the remaining Federal Maritime Commission regulatory authority that has helped to control anticompetitive conduct.

I believe that consumer welfare is best served by a policy of promoting competition in ocean liner shipping. It appears, however, that there may be non-economic reasons to change the procedures used by the United States to do so. Other nations besides the United States recognize the competition problems in liner shipping conferences, but only the United States applies its general antitrust law, with its criminal penalties and private treble damage suits, to the liner industry. It may be necessary to "place a new emphasis on harmonizing U.S. policies and practices with those of our trading partners," as Sen. Gorton stated on introducing this bill. But in so doing, I think we should guard against abandoning the goal of competition in international or domestic commerce.

In some respects, S. 47 compensates for granting broad antitrust immunity, either by making exceptions to the immunity or by prescribing regulatory procedures and standards to protect competition. But in several important respects, S. 47 fails to provide necessary and feasible protections against cartel abuse. Unless these faults are corrected, the proposed Shipping Act of 1983 will inflict unnecessary injury on the American economy and the American consumer.

Tariff Filing and Enforcement

If it is necessary to grant antitrust immunity to these shipping cartels, then it would seem highly desirable that the FMC's authority over tariff filing and tariff enforcement be repealed. The only practical result of this authority is that the United States government polices and supports the cartel agreements at no cost to the cartels or their members. Federal

tariff enforcement helps maintain an antiquated rate structure with little relationship to true costs, and it fails to protect small shippers from discrimination. Moreover, the United States is now one of only a few nations with mandatory tariff filing and with government-imposed penalties for failure to adhere to filed tariffs. Eliminating this authority would bring United States law into line with that of most other trading nations.

Cartel success is dependent upon mechanisms for detecting and deterring cheating by its members. FMC tariff filing and enforcement provides that mechanism at no cost to the conference cartels. Thus the FMC, by reducing the costs of administering the cartel, increases the potential gains from collusion. Because the greater the expected gains from cartelization, the more likely a cartel is to succeed, FMC policing and enforcement is probably a major, albeit unintended, force for cartel stability. This is contrary to longstanding policy of the United States government to encourage the forces of competition. Appropriate public policy, to be historically consistent and to represent the interests of the American people, should seek to increase the costs of a cartel, not reduce them.

Tariff filing and enforcement also helps perpetuate an inflexible and complex rate structure. Rate complexity results from the traditional emphasis on demand factors, especially the value of the commodity, rather than on the actual inventory and transportation costs of shipment. Different commodities, facing different demand elasticities, are shipped at different rates -- even when the cost of providing shipping services is unchanged. Rate uniformity across all carriers results from the conferences' necessary reliance on averages. Uniformity not only provides no incentive for carriers to compete through lower costs, but also gives inaccurate prices for guiding production, location and consumption decisions. Stringently enforced uniform tariffs encourage non-price competition, and thus perpetuate the problem of excess capacity. Without the support that FMC enforcement

supplies to cartel stability, individual carriers might find it worthwhile to act independently to set rates to optimize their individual profits, given their specific competitive and cost conditions. The resulting rate structures are likely to be less uniform, but also less complex.

Finally, tariff filing and enforcement do not protect small shippers. Conferences have developed enormously complex commodity rates to provide competitive rates to shippers with alternative means of transportation, primarily large shippers. Small shippers usually cannot get the benefit of these more competitive rates. Instead, conferences can use the rate structure to insure that all possible rents are extracted from the small shipper without eliminating the traffic altogether. FMC enforcement of the rate structure eases their task.

While there are many beneficial purposes cited for official tariff filing and enforcement, I believe these can be accomplished in other ways. If shippers indeed want published tariffs, then commercial publications will appear, as they have in Europe, to provide tariff information. Indeed, it may be unnecessary, and even undesirable, to require commercial publication. If shippers do not in fact need published tariffs, then publication might only help the carriers check each others' prices.

Government oversight should not be needed to prevent discrimination or "malpractice," either. If failure to adhere to announced rates and services unfairly causes damage, then a private right of action for damages or reparations would be available, under the Shipping Act, and should be sufficient to provide a remedy. If there is no injured party, then the only purpose served by requiring letter-perfect adherence to tariffs would seem to be the prevention of competition.

Government enforcement of the conference-cartel agreements is not a long-established industry condition. Tariff filing and enforcement by the government were never envisioned or

recommended by the Alexander Report or the 1916 Shipping Act. The FMC has only had these powers since 1961. Moreover, the FMC does not now have the authority to challenge or suspend international liner rates it finds to be unjust or unreasonable (except with respect to controlled carriers, from Communist countries). S. 47 would remove what little authority the FMC now has to protect shippers and consumers against monopolistic rate levels, namely its authority to disapprove rates "so unreasonably high or low as to be detrimental to the commerce of the United States."* I do not mean to suggest that a public-utility style of rate standard should be bureaucratically imposed on this industry. A more competitive model would be desirable, and feasible. But the regime of tariff filing and enforcement that S. 47 would perpetuate promotes neither competition nor consumer and shipper welfare. It would not be revolution, but only healthy reform, to eliminate these unmistakably anticompetitive government intrusions into the marketplace.

The major themes supporting this legislation are ending excessive government regulation and making United States law consistent with the practices of other nations. Continuing the FMC's pervasive regulation of tariff filing and enforcement of cartel agreements would seem to contradict both of these important purposes.

Interconference Agreements and Conference-Prescribed Joint Through Rates

Intermodal transportation is an important and valuable technological innovation. Reduced regulation of motor carriers and railroads has stimulated competition in the development of efficient and innovative intermodal means of transport. It is important to prevent ocean liner conferences from dampening those competitive incentives and from attempting to extend their monopoly power into competitive domestic markets.

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* Shipping Act, § 18(b)(5).

Individual ocean carriers should be free to quote through rates and to negotiate such rates with inland carriers. But S. 47 would also allow joint through rates to be set by conference agreement. Through such agreed-upon uniform rates, the conferences may well be able to extend their monopoly position. Shippers or inland carriers may receive few of the savings from intermodal efficiencies; those savings would pass, as monopoly rents, to the cartel.

Allowing liner conferences, through joint agreements for intermodal transportation, to impose the "dead hand" of monopoly on areas of the trucking and rail industry is at odds with recent bipartisan -- and widely applauded -- legislation. The Staggers Rail Act, the Motor Carrier Act of 1980 and the airline deregulation legislation constituted major milestones in the effort to encourage lower prices and innovation in industries which, for too long, had remained encrusted with pervasive regulation. It would be ironic indeed if, in the name of "deregulation" of ocean shipping, we were to supplant government regulation of land transport with monopoly abuse by cartels.

Competitive problems raised by intermodal technologies are recognized, and addressed to some extent, in the bill. In many ways, the bill tries to preserve competitive alternatives in inland transportation. All these means -- prohibiting conference bargaining with inland carriers, applying antitrust penalties to agreements with inland carriers, and to agreements between ocean carriers on the division of through rates with inland carriers, and requiring optional port-to-port loyalty contracts -- would help to prevent some possible competitive abuses. But they would not eliminate completely the conference cartels' potential monopoly power over inland shippers and carriers.

S. 47 would also permit agreements between conferences and between carriers in different conferences. Agreements that equalize freight rates between widely disparate ocean and intermodal routes have adverse implications that go beyond their

fundamental purpose of eliminating competition among ocean carriers. They also stifle competition among land carriers and, by equalizing rates without regard to differences in costs, discourage further efficiency-creating innovations in intermodal transportation. In addition, they reduce the chances that any savings from cost-reducing innovations will be passed on to shippers. S. 47 attempts to mitigate these anticompetitive threats by requiring a provision for independent action in these interconference or intercarrier agreements; but I fear this may not be enough to overcome the attractions of collusion.

Even with safeguards to protect competition in domestic land transportation, there may still be market situations in which ocean carrier agreements on intermodal transport will unduly strengthen or extend the cartels' monopoly. The effect will vary from market to market, depending upon the degree of competition within the conference and the degree of competition that shippers have available for the inland transport leg. A better solution would be to establish a clear line: intermodal through rates may be set by individual carriers, but not by ocean conferences, and not by agreements between conferences or between conferences and independents.

Loyalty Contracts and Pro-Competitive Alternatives

S. 47 would continue to permit dual-rate loyalty contracts, so long as they follow rigidly prescribed limitations. But dual rate loyalty contracts are substantially similar to the anticompetitive deferred rebate arrangements that are already prohibited by the Shipping Act, and would continue to be prohibited by S. 47. Deferred rebates are simply a more enforceable dual rate system. Both are intended largely to create entry barriers against independent, non-conference competition. Loyalty contracts may also have some efficiency-promoting effects, but these effects could be obtained by alternative methods at less risk to competition.

S. 47 explicitly authorizes two means of achieving planning

efficiencies and scale economies without loyalty contracts, namely time-volume rates and service contracts. Both methods would respond directly to marketplace needs for efficient planning; neither would incorporate the explicit anticompetitiveness of the loyalty contract or deferred rebate. Time-volume rates would offer discounts dependent on size and frequency of a shipper's cargo -- not on whether the shipper used a competitor. Service contracts would permit even more accurate resource planning than time-volume rates, and would most likely reflect a marketplace balancing of shipper and carrier planning needs. Injured parties would be able to obtain redress before the FMC in cases of unjust discrimination or evasion of common carrier obligations.

Loyalty contracts are currently being challenged in several countries. The member councils of the European Shippers Councils recently initiated a study of loyalty contracts; they felt that the advent of containerization has cast doubts on the contracts' validity and practicability. In Britain and Canada, loyalty contracts are also being seriously challenged by shippers or by the government.

If loyalty contracts must be retained, despite the availability of superior alternatives, then the possible competitive abuses of loyalty contracts must be constrained. Since S. 47 would include loyalty contract matters in its grant of antitrust immunity, pro-competitive corrections and constraints against abuse must be imposed by the Shipping Act itself. Requiring a right of independent action in a conference with a loyalty contract is a step in the right direction. However, the procedural restrictions, including publicity and delay, imposed on this independent action by S. 47 may tend to be disincentives to competitive pricing initiatives. In addition, it should be noted that "independent action" may also be used anticompetitively. For example, a conference carrier might take independent action to punish or deter an isolated competitive

threat, and be compensated for its resulting losses through revenue pooling in the conference. To avoid this possibility, there should be some protection against using revenue pooling to compensate for losses to conference members due to independent action.

Another pro-competitive option would be to prohibit loyalty contracts covering all of a shipper's cargoes. The British government and the British Shippers' Council have come out in opposition to loyalty contracts that require 100 percent of a shippers' custom be committed to a conference. According to the UK government, a policy that limited conference commitments to 70 percent would provide a needed stimulus to non-conference competition, and an essential check on conference's monopoly power.* In Canada, only 1 percent of shippers surveyed believed that shippers should be required to commit 100 percent of their custom to a conference. Thirty percent thought loyalty contracts should be prohibited altogether.** The practical effect of a cap would be that the loyalty contract carrier would be forced to meet independent competition to obtain the remainder of the shipper's cargo. In the long run, it should make it more difficult for the conference to maintain a supracompetitive price for the loyalty-contract portion as well

Shippers' Councils

Antitrust immunity for shippers' councils, which S. 47 would grant, may well be ill-advised. While I can understand their logic, on the whole I must doubt whether these councils would have the desired effect. Such conferences are likely to be an ineffective check on the conferences' market power. Moreover, they may be a breeding ground for domestic antitrust problems outside the area of transportation services. The best way to

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* Containerization International, "British Loyalty Proposals," December 1982, p. 9.

** E.M. Ludwick & Associates, "Exempting Liner Conferences from Competition Laws: The Perspectives of Canadian Shippers," Consumer and Corporate Affairs Canada, Bureau of Competition Policy, October 1982.

deal with abuses by a monopolistic cartel is to weaken its monopolistic power and strengthen its potential competitors, not to erect a new potentially monopolistic group to bargain with it. S. 47 apparently would permit shippers' councils to act as middlemen, not only negotiating more favorable rates and services, but actually assembling cargoes to take advantage of time-volume rates or service contracts. Although the recent amendment could limit this shippers' council service to "small shippers," it would be preferable for this valuable and essential service to be performed by non-vessel-operating common carriers such as freight forwarders, rather than by competitors in the marketplace for the goods being shipped. If shippers' councils are to be permitted, I suggest they be subject to careful scrutiny or certification procedures by the antitrust enforcement agencies, along the lines included in the House Judiciary Committee's Report of H.R. 4374 in the last Congress.

Conclusions

Congress is considering sweeping antitrust immunity for this industry at a time when other countries are questioning the wisdom of having done so. In Canada, a debate is being joined on whether to renew the Shipping Conferences Exemption Act upon its expiration in March, 1984. To assist the Canadian government is determining its policy, a survey was conducted in mid-1982 of Canadian users of ocean shipping services. The survey revealed that current arrangements for exempting liner conferences were unsatisfactory to almost 85 percent of Canadian shippers. More than half of these considered the marketplace to be the best regulator of the system. Significantly, as many small shippers as large shippers preferred the marketplace as the regulator.*

* E.M. Ludwick & Associates, "Exempting Liner Conferences from Competition Laws: The Perspectives of Canadian Shippers," Consumer and Corporate Affairs Canada, Bureau of Competition Policy, October 1982.

The Supreme Court has said, rightly, that the antitrust laws are the "magna carta" of our enterprise system. The near-total withdrawal of antitrust oversight from this industry would be a major step, since the costs to the consumer of the conference cartel system would appear to be quite serious. If that withdrawal is nevertheless necessary, and non-economic considerations are held to justify measures that restrain competition, then those measures must be tailored to achieve their objectives by the least anticompetitive means feasible. In particular, the government should withdraw from the business of publicizing and enforcing cartel agreements. In addition, even tighter controls must be placed on interconference agreements and other agreements that could permit the cartels to extend their powers further into the competitive domestic economy. These changes, and the others discussed in my testimony, are recommended, to prevent the Shipping Act of 1983 from causing unnecessary deterioration in competitive conditions in this industry.

In closing, let me return to my opening themes. It is because of our agency's antitrust mission that I am prompted to raise some doubts about this bill; other values being pursued are not my area of knowledge or practice. I believe that several improvements can be made in this bill, and still achieve its principal goal, without anticompetitive harm. And I must again applaud all there is in this bill that increases efficient operation at the Federal Maritime Commission, under its most able leadership.

The CHAIRMAN. Next is Mr. Jay Angoff. Mr. Angoff, we are glad to have you. You may proceed with your statement. Do you have a written statement?

Mr. ANGOFF. Yes, I do.

The CHAIRMAN. Mr. Angoff, I wonder if we could put your entire statement in the record. I wonder if you would care just to summarize the high points of it. That will save time for all concerned if you would just summarize the high points.

STATEMENT OF JAY ANGOFF, CONGRESS WATCH, WASHINGTON, D.C.

Mr. ANGOFF. I will be glad to summarize my statement.

Mr. Chairman, I am Jay Angoff.

The CHAIRMAN. I believe, according to the statement I have here, you are representing the Consumer Federation of America.

Mr. ANGOFF. I am a lawyer of Congress Watch, but I represent the following organizations which concur in my testimony——

The CHAIRMAN. You are from Congress Watch. As I understand, you are speaking on behalf of the Consumer Federation of America, the Consumers' Union, National Farmers Union, National Farmers Organization, and American Association of Retired Persons. Is that correct?

Mr. ANGOFF. That is correct.

The CHAIRMAN. You may proceed.

Mr. ANGOFF. Mr. Chairman and Senater Metzenbaum, I appreciate the opportunity to testify here on S. 47. Congress Watch, as well as the other organizations, opposes S. 47 because we all represent consumers. What S. 47 would do would be to raise prices to consumers.

S. 47 expressly allows ocean carriers to engage in per se violations of the antitrust laws. These are actions like price fixing and dividing up markets, activities that in other industries are punishable by up to 3 years in jail and a fine of up to $1 million.

There are many areas of antitrust today that are controversial. There are many areas in which different economic philosophies disagree. But everybody agrees that price fixing, market division, and horizontal violations raise prices and restrict output and are per se and should be per se unlawful.

I would like to emphasize that Mr. Campbell's testimony, representing the FTC, was approved unanimously by all five members of the Federal Trade Commission. That is something that probably has not happened in the last 2 years, and it probably is not going to happen again in the next 2 years. These five Federal Trade Commissioners represent economic schools that differ considerably. So, when all five FTC Commissioners ascribe to one view, it demands serious consideration.

I am not going to belabor the point about how bad price fixing is, since most of us already know that. In fact, the prime sponsor of S. 47, Mr. Chairman, Senator Gorton, is generally one of the strongest defenders of the antitrust laws in the Senate. But the argument is made that the ocean carrier industry is different.

I would like to very briefly go over the three major justifications for exempting the ocean carrier industry from the antitrust laws.

The first is that the American shipping industry is in trouble and that, by exempting it from the antitrust laws, we will get it out of trouble.

Well, there are really two parts to that argument. I think neither part is meritorious.

First, the General Accounting Office did a study which showed that the ocean carrier industry was actually in relatively good condition. The Department of Transportation cited different statistics and pointed out accurately that there are many industries that make higher profits than the ocean carrier industry and that there are a few companies in the shipping industry that are not doing so well. But the consensus seems to me that the shipping industry, while not exactly flourishing, is not a dying industry. So, it does not need Government help.

Second, Mr. Chairman, more important, if it did need Government help, exempting the industry from the antitrust laws is not the most efficient way to aid it. As Mr. Campbell just pointed out, about three-quarters of the traffic carried to and from the United States is carried by foreign carriers. These foreign carriers would get about three-quarters of the benefit of the antitrust exemption for the shipping industry.

For every dollar in benefits that American companies would get from an antitrust exemption, foreign shipping companies would get about $3. That is just not a very efficient way to aid the shipping industry.

The second major argument that proponents of S. 47 make is that the antitrust laws are fine for regulating domestic commerce, but are inappropriate for international commerce. They claim that since many foreign countries do not have antitrust laws, our laws place American shipping companies at a disadvantage.

This argument fails to recognize that the U.S. antitrust laws apply to all companies doing business with the United States. Foreign companies as well as American companies must obey those laws. So, American companies are not at a disadvantage.

On the other hand, proponents of the bill will argue that if the United States insists on enforcing our laws against foreign carriers, we will antagonize our trading partners.

While I do not think that argument holds much water, it does not seem unreasonable to require Japanese carriers, for example, if they trade with the United States, to obey American antitrust laws. We do not try to impose our laws on foreign companies trading between, say, Japan and Malaysia. But, if they trade between Japan and America, it seems only fair for them to obey the American antitrust laws.

The third point that the proponents make in the defense of the bill is that the bill must be a good bill or at least a reasonable compromise because everybody supports it. The big shipping companies support it. The major maritime unions support it. The big shippers support it. Well, it is arguable that the bill gives all of those groups something. It gives shippers' councils a cartel of their own. And, by exempting the maritime industry from the antitrust laws, it allows them to make a profit regardless of how well they manage their company because all the cartel has got to do is to set the cartel

price at a high enough level to allow even the most inefficient company to make a profit.

The maritime unions, arguably, also benefit because they know that any labor costs can be passed on by the company to the consumer in the form of higher prices.

In our view, Mr. Chairman, the fact that all three major groups support the bill is not cause for comfort; it is cause for alarm.

There is one section of the bill, Mr. Chairman, that I think is particularly harmful. That is section 18. Section 18 does give the Federal Maritime Commission, a Government agency, virtually a free reign in enforcing the Shipping Act. There are a few enumerated practices in the bill that are unlawful under the Shipping Act. The FMC has jurisdiction to enforce violations of those practices. The penalty is not very great, but they are unlawful. Yet, section 18 allows the FMC entirely on its own to legalize the enumerated unlawful practices in the bill. If the FMC wants, it can say that fighting ships, deferred rebates, predatory practices, and boycotts are all legal. These will not be adequate legislative checks over these actions.

It seems a little anomalous today, when Congress and the courts are both seriously scrutinizing the actions of Federal agencies, that the Federal Maritime Commission, in effect, is given the power to override both Congress and the courts.

In conclusion, Mr. Chairman, the antitrust laws are important, but they were not written on Mt. Sinai. There may be a case to be made for exempting this industry from the antitrust laws. But the case has not been made. Anyone who has studied the issue, whether it is the House Republican Research Committee or the Justice Department under President Carter or the General Accounting Office, has come to the conclusion that antitrust immunity is totally unjustified in this industry. Far from expanding the existing antitrust immunity, we recommend that this committee take away the limited antitrust immunity that the industry already has and effectively force the industry to compete.

This administration should be commended for trying to eliminate or at least reduce the direct Government subsidies that taxpayers have given to the maritime industry year after year. But an antitrust exemption is another subsidy, unfortunately, that would go mostly to foreign carriers.

We suggest that, rather than subsidize the industry, whether directly or indirectly, that the Congress require the maritime industry to compete. We believe that if they were required to compete, they would survive, even flourish.

Thank you. I would be glad to answer any questions the committee might have.

The CHAIRMAN. Thank you very much. Senator Metzenbaum.

Senator METZENBAUM. Mr. Angoff, there are several arguments that supporters of S. 47 have made that I would like your views on.

First, some have said that this bill merely clarifies existing antitrust immunity. Would you care to comment on that?

Mr. ANGOFF. I do not think the supporters of the bill make that argument very seriously. Secti?n 4 expressly says that certain practices are lawful. These practices are the per se violations of the antitrust laws. It expressly allows carriers to discuss, fix, and regu-

late rates; to control, regulate, or prevent competition in international ocean transportation; to restrict salings between ports; to pool net profits; to do the horizontal per se violations of the Sherman Act, which in other industries would be punishable by 3 years in jail and a fine of $1 million.

Senator METZENBAUM. You really cannot make the argument that it is just clarifying because, actually, under present law, if you go to the FMC, you have to show that it is in the public interest. And the public interest includes a concern for the antitrust laws as stated by the Supreme Court. Is that not correct?

Mr. ANGOFF. That is correct.

Senator METZENBAUM. Supporters also argue that the list of prohibited acts in section 12 of the bill protects shippers and consumers from any risk of predatory conduct by the conference. Realistically, is that likely to be the case?

Mr. ANGOFF. As a practical matter, I do not think it is. The list of prohibited practices is very short. In addition, there is no private right of action under this bill—all rights to sue are given to the FMC. If the Federal Maritime Commission decides not to bring a case, there is absolutely nothing that the injured individual can do to recover for his injury. Under the antitrust laws, there is a private right of action. The Justice Department and the Federal Trade Commission and State and local governments, for that matter, can also bring cases. Under this bill, the FMC has the final word. It is certainly a cutback on the existing right of consumers.

Senator METZENBAUM. According to the carriers, S. 47 would eliminate excessive costs, the process known in the trade as rationalization. Actually, rationalization is not really much more than the carriers getting together and saying the Jones Co. has the right to handle a certain area of operation, a certain class of product, and cover certain areas; and the Smith Co. can go to another area with respect to a certain kind of product. And rationalization is another way of saying market allocation, market division.

What is your view about rationalization of the carriers?

Mr. ANGOFF. Senator, that is exactly what rationalization is. They claim that they would more efficiently use existing facilities if they could collade to fix prices and divide markets. And there is much to be said for that argument. The only problem is, when they are given antitrust immunity, they may be a little more efficient but they are going to charge much higher prices. If all antitrust immunity were taken away and they were forced to compete, the efficient carriers would also end up using their resources efficiently but there would be lower prices; and that is what I think everybody is after.

Senator METZENBAUM. Mr. Angoff, I am not sure if you are in a position to respond to this. My examination into the shipping industry indicates that the shipping industry has been a good enough industry that some of the major companies of America have decided to set up divisions or to buy up other companies that are in the shipping industry. Holiday Inns has a Delta Line subsidiary that had operating income of $46 million in 1981. R. J. Reynolds' Sea-Land subsidiary had operating income of $103 million out of a revenue of $1.6 billion.

LTV Corp. has its division called Lykes Steamship Co. and had operating income in 1981 of $27 million. And the American President Line subsidiary of Natomas had $38 million income.

There are two other lines. On one I have not been able to ascertain the facts as yet. But U.S. Lines has indicated that they would not make their figures available, although I feel confident that we will soon obtain them.

Do you know of anybody in the shipping industry that really is in need of some special kind of protection, and particularly in view of the fact that these U.S. carrier lines are all receiving from the Federal Government shipping subsidy, with the exception of the Sea Land subsidiary of R. J. Reynolds, that does not get any subsidization?

Mr. ANGOFF. Senator, I think we do have to keep in mind that every year taxpayers pay hundreds of millions of dollars in direct subsidies toward shipping companies.

Senator METZENBAUM. How much?

Mr. ANGOFF. It is in the hundreds of millions in direct subsidies. That is both the operating subsidy and the construction subsidy.

In 3 of the last 5 years, the shipping industry as a whole made a return on equity of about 10 percent.

Senator METZENBAUM. Ten percent of what?

Mr. ANGOFF. That is the return on equity.

Senator METZENBAUM. Return on equity.

Mr. ANGOFF. There are some companies that do better. There are some companies that do worse. There are some companies in the industry that are doing very well. There are some that are not doing so well. But most other industries are able to survive without subsidies. I fail to understand why the ocean carrier industry should not also be required to compete without subsidies.

Senator METZENBAUM. Thank you, Mr. Chairman. Thank you, Mr. Angoff.

The CHAIRMAN. Mr. Angoff, I just have a question here I would like to propound to you.

I note you are speaking on behalf of the National Farmers Union. What specific effect do you think this bill will have on the farmers of the country?

Mr. ANGOFF. The National Farmers Union is particularly concerned that the delivered price of the goods that they export will be raised and therefore they will have a tougher time competing in the international marketplace. That is their specific concern.

The CHAIRMAN. How much harm do you think this bill will cause to the American consumer?

Mr. ANGOFF. I am not personally expert on that. The figure that I have seen, which has been estimated by one of the leading authorities in the field, is $3 billion a year to the American consumer. It would raise the delivered price of goods by an average of 20 percent.

The CHAIRMAN. Do you have some specific recommendations that you would like to get to the staff on this bill?

Mr. ANGOFF. Yes, I do.

The CHAIRMAN. Can you do it in the next 2 days?

Mr. ANGOFF. Yes, I can.

The CHAIRMAN. Thank you very much.

[Prepared statement of Jay Angoff follows:]

STATEMENT OF JAY ANGOFF

STAFF ATTORNEY

PUBLIC CITIZEN'S CONGRESS WATCH

Mr. Chairman, Members of the Committee:

My name is Jay Angoff and I am a staff attorney with Public Citizen's Congress Watch, a public interest advocacy group founded by Ralph Nader. Public Citizen is a nationwide consumer organization with approximately 70,000 members.

I am authorized to say that the Consumer Federation of America, Consumers Union, the American Association of Retired Persons, the National Farmers Union and the National Farmers Organization concur in my testimony.

Mr. Chairman, S. 47 exempts the ocean carrier industry from the antitrust laws. It assures ocean carriers that no matter what activities they engage in--even if those activities violate both the antitrust laws and the Shipping Act--they cannot be sued by private parties, by state and local governments, or by the Department of Justice or Federal Trade Commission. The Federal Maritime Commission has the power to seek a $5,000 civil penalty ($25,000 for a willful violation) if carriers engage in certain specified practices. But the list of specified practices is extremely short; and the $5,000/$25,000 civil penalty palls in comparison to the normal antitrust remedies of treble damages in a private case and up to three years in jail and a $1 million fine in a criminal case. In addition, the FMC is free not to act. If the FMC chooses not to act, private parties who have been injured by the activities of ocean carriers have no remedy--regardless of the seriousness of their injury or the anticompetitive nature of the carriers' conduct.

The bill's proponents do not dispute the fact that S. 47 establishes a virtually complete antitrust exemption for the ocean carrier industry. They argue, instead, that an antitrust exemption is justified, on several grounds. In my testimony I will first explain what S. 47 expressly allows ocean carriers to do that corporations in other industries cannot do. Second, I will examine the arguments made by the ocean carrier industry to justify its antitrust exemption. Finally, I will offer a

constructive alternative to an antitrust exemption that would benefit the U.S. ocean carrier industry and would not impose costs on consumers or taxpayers.

What S. 47 Would Do

Mr. Chairman, S. 47 expressly allows ocean carriers to (1) "discuss, fix and regulate rates," to (2)"pool...net profits," to (3) "restrict...the number...of sailings between ports," to (4) "limit...the volume or character of cargo...to be carried," to (5) "engage in exclusive...arrangements...with one or more marine terminal operators," to (6) "control, regulate, or prevent competition in international ocean transportation," and to (7) "confer with shippers and shippers' councils regarding general rate levels."

In other words, S. 47 allows shipping company executives to sit down in a smoke-filled room and (1) agree to all charge the same price; (2) agree to divide up their profits according to a pre-determined formula, regardless of the profit (or loss) of any individual shipping company; (3) agree to serve some ports frequently but other ports infrequently or not at all; (4) agree to carry certain kinds of cargo frequently but other kinds infrequently or not at all; (5) agree to work exclusively with certain marine terminal operators and not at all with other marine terminal operators; (6) agree to do anything else* to prevent competition in international ocean transportation; and (7) agree on rates with a group of manufacturers who have already sat down in a smoke-filled room and agreed on rates among themselves.

If people or companies in other industries engaged in any of these practices they would be subject to up to three years in jail or to fines of up to $1 million. This is because these practices all, as the Supreme Court has said, have a "pernicious effect on competition" and "lack any redeeming virtue."** While different economic schools and different administrations might disagree about certain antitrust violations--such as vertical restraints or price discrimination--there is absolutely no disagreement about the kinds of activities that are expressly allowed in S. 47. Because these practices raise prices and restrict output, they are and should be illegal per se.

*with the exception of the enumerated practices set out in §12(c) of the bill.

Justifications Offered for Exempting Ocean Carriers from the Antitrust Laws

Those who favor the exemption generally admit that it will raise prices and restrict output, but offer a number of justifications for the exemption. We believe that none of these justifications withstands scrutiny, for the following reasons.

Justification #1 "The U.S. merchant marine industry is a declining industry. Unless the government saves it, it will die."

The General Accounting Office* has concluded that the condition of the U.S. liner fleet does not justify a major revision of the shipping act. While the number of U.S. flag general cargo vessels fell from 523 in 1970 to 256 in 1980, and the number of shipping companies fell from 19 to 9 in the same period, the U.S. fleet carried about the same amount of cargo in 1978 as it did in 1970, measured by both value and tonnage. The U.S. merchant marine industry has simply taken advantage of the new containerization technology which enables fewer containerships to transport the same amount of cargo in the same amount of time as conventional vessels.

In comments accompanying the GAO report, the Department of Transportation does not dispute GAO's statistics. DOT does point out, however, that the rate of return on equity for the U.S. flaglines has exceeded 10% in only 3 of the last five years. DOT also argues that the industry is likely to decline in the future because direct government subsidies to it are being cut.

The consensus seems to be that the industry, while not exactly flourishing, is not dying either. But even if the industry were dying, exempting it from the antitrust laws would be a terribly inefficient way of trying to save it. For an antitrust exemption allows all carriers--both American and foreign--to raise their prices. Since foreign carriers carry more than 70% of the ocean going traffic (whether measured by dollar value or tonnage), they can be expected to get more than 70% of the antitrust exemption's benefits. If the government determines that the U.S. merchant marine industry must be subsidized, there must certainly be less expensive,

*See Comptroller General's Report to the Chairman, Committee on Merchant Marine and Fisheries, U.S. House of Representatives, July 2, 1982.

more efficient ways of doing it than by giving foreign carriers almost $3 for each $1 the government gives American carriers.

Justification #2 "Price-fixing should not be allowed in domestic commerce. But the merchant marine industry is different, because it moves in international commerce, and many foreign countries allow their shipping companies to fix prices and divide up markets. If the U.S. denies American shipping companies the same privilege, it puts U.S. companies at a disadvantage in competing with foreign companies. On the other hand, if the U.S. requires foreign companies to obey our antitrust laws, it antagonizes our trading partners."

The U.S. antitrust laws do not apply only to U.S. companies. Rather, they apply to all commerce--whether engaged in by U.S. or foreign companies--with or within the U.S. Because foreign carriers using American ports as well as American carriers must obey U.S. antitrust laws, U.S. carriers are not at a competitive disadvantage.

Some shipping companies have argued that while foreign companies in commerce with the U.S. are theoretically subject to U.S. antitrust laws, in practice the government has enforced the law frequently against American companies and rarely against foreign companies. The GAO study demonstrates, however, that U.S. flag carriers are not discriminated against in antitrust enforcement. Of 58 rebating and malpractice cases brought by the FMC against ocean carriers between October, 1976 and June, 1980, the GAO found that only 14 were brought against U.S. flag carriers, although U.S. carriers carried about 16/58 of all liner tonnage transported. Thus, U.S. carriers were actually sued slightly less than their fraction of total tonnage carried would indicate.

Some proponents of the antitrust exemption also argue that U.S. antitrust laws antagonize our trading partners who do not have antitrust laws. But it does not seem unfair to require foreign companies to comply with U.S. laws when they're doing business with the U.S. The United States does not seek to apply its antitrust laws to Japanese ocean liners trading between Japan and Malaysia; but if Japanese shipping companies trade between Japan and San Francisco, then they certainly should comply with U.S. laws. At inter-

national conferences the U.S. has urged other countries to enact antitrust laws, and many have done so. We should not now abandon our commitment at the very time some foreign countries are starting to get our message. Moreover, if we are really worried about antagonizing our trading partners, then we should prevent protectionist legislation from being enacted, not exempt entire industries from the antitrust laws. By strictly applying our antitrust laws to all commerce with the U.S.--whether engaged in by U.S. or foreign-owned companies--we would be both furthering the cause of free trade and lowering prices to consumers.

Justification #3 "It is true that in most industries, competition is good. But in the merchant marine industry, competition is destructive. In the short run there will be rate wars, and prices will go down, but in the long run most carriers will be driven out of business and the few remaining carriers will raise their prices to a level higher than today's prices."

There is no more reason for competition to be "destructive" and to result in higher prices in the long run in the shipping industry than there is in any other industry. In fact, shipping is more naturally competitive than most other industries, since ships can easily be shifted from one route to another. If rates are high and carriers are making supra-competitive profits on one route, then carriers from another route will shift over to the higher profit route until rates are driven down.

Justification #4 "Shippers' councils will prevent the conference from abusing their monopoly powers."

Shippers' councils are justified on a two-wrongs-make-a-right theory: the way to counterbalance the monopoly power an antitrust exemption would give carriers, is to give shippers an antitrust exemption, too.

This argument should be taken seriously, since without shippers' councils shippers would generally be at a disadvantage against the carriers' cartel. But what the shippers' cartel and the carrier cartel agree to is likely to injure the consumer. Large shippers naturally like to prevent other shippers from getting a lower rate and thus, all things being equal, charging a lower price. Shippers councils allow them to do this by ensuring that shippers will not compete among themselves in offering traffic to carriers.

In addition, shippers councils would provide shippers with a convenient forum to fix prices on products sold domestically and to divide up domestic markets. By expressly allowing shippers to "mutually consult and exchange information" regarding rates on their exports, S. 47 could have the effect of shielding from antitrust prosecution exchanges of information that have domestic anticompetitive effects, since there is often no clear line of demarcation between information affecting foreign operations and information affecting domestic operations.

In short, shippers' councils are an understandable response to the unprecedented monopoly power S. 47 would give to ocean carrier cartels. But by giving monopoly power to shippers as well, shippers' councils, while arguably helping large shippers, could make things even worse for consumers. Rather than giving monopoly power to both carriers and shippers, Congress should give it to neither.

Justification #5 "The right of independent action will prevent the conferences from abusing their monopoly power."

The right of independent action under S. 47 is largely illusory. First, it does not apply under all circumstances, but only when the conference employs loyalty contracts--contracts under which a shipper gets a lower rate in exchange for shipping all his traffic with a particular conference or carrier.

Second, even when a loyalty contract is in effect, a carrier can't simply set an independent rate. Rather, he must announce it to the conference in advance, and the conference then has 30 days to decide whether to make the independent rate the conference rate. This insures that a carrier wishing to take independent action will antagonize the other conference members. It also lessens--it if doesn't eliminate--the incentive to offer such a rate, since the carrier knows his lower independent rate will not bring him additional traffic if the conference makes that rate the conference rate.

Justification #6 "Exempting the merchant marine industry from the antitrust laws is supported by the major carriers, the major maritime unions, and the major trade association of shippers. Therefore, it must be a good bill--or at least a reasonable compromise."

Arguably, exempting the merchant marine industry from the antitrust laws would benefit large carriers, large shippers, and

maritime unions. But it would hurt the consumer--as well as "little guys," mavericks and independents among carriers, shippers and workers.

Both the large carriers and organized maritime labor support an antitrust exemption because it allows both to profit without requiring either to become more efficient. Because exempting carriers from the antitrust laws assures that carriers will not compete on price, carriers have no incentive to become more efficient; they can simply raise their prices high enough for even the highest-cost carrier to make a profit, rather than try to cut costs. And the maritime unions have no incentive to become more efficient because they know the carriers, because of their antitrust exemption, can simply pass on increased labor costs to the consumer.

Large shippers benefit under S. 47 because the bill legalizes shipper councils and loyalty contracts, both of which provide advantages to large shippers that as a practical matter are not available to small shippers. Specifically, shippers' councils enable large shippers to prevent smaller shippers from offering traffic to carriers on more favorable terms than those offered by large shippers. And loyalty contracts would allow large shippers to have their cake and eat it too, since large shippers have the volume--and thus the leverage--to obtain a discount rate, while small shippers generally don't.

In short, S. 47 allows big shippers, big carriers, and big labor to all sit down together and collude rather than compete. From the consumer's point of view, that all three groups support the bill is not cause for comfort; it is cause for alarm.

A Blank Check for the FMC

§18 of S. 47 makes a bad bill worse. §18 expressly allows the FMC to "exempt for the future any specified activity or class of agreements subject to this Act from any requirement of this Act." This would allow the FMC to make its own law, regardless of what Congress or the courts have said. For example, under §18 the FMC could legalize fighting ships--ships used solely to drive another carrier out of business-- deferred rebates, boycotts, predatory practices, and other activities that are violations of both the antitrust laws and the shipping act. At a time when agencies are coming under closer scrutiny by both Congress and the courts, it

it is somewhat anomalous to give the FMC power, in effect, to override both Congress and the courts.

Conclusion

If Congress is to take the admittedly extreme step of exempting the shipping industry from the antitrust laws it should insist on evidence that clearly justifies such an exemption. But every study that has been done of the industry points to the conclusion that an antitrust exemption is not justified. Last year's GAO study, done at the request of the House Merchant Marine Committee, concluded that the U.S. shipping industry "has performed adequately and does not appear to be in the state of decline generally ascribed to it," and that substituting competition for antitrust immunity in the shipping industry would likely lead to lower rates with no reduction in service quality. The House Republican Research Committee last year reached the same conclusion. The HRRC stated:

> The United States should ignore pleas to strengthen shipping cartels in order to permit greater than competitive profits. Strengthened shipping cartels would require heavy government regulation by the FMC to provide minimal protection for consumers from non-competitive practices. Instead, the U.S. should not permit conferences in U.S. trades, deny anti-trust immunity to operators, remove most FMC regulation and rely on the competitive forces of the marketplace to ensure more efficient and less costly oceanborne transportation service.

Similarly, in a 1977 study entitled The Regulated Ocean Shipping Industry, the Justice Department concluded that there was absolutely no principled justification for exempting the ocean carrier industry from the antitrust laws.

Mr. Chairman, this administration is to be commended for trying to reduce the hundreds of millions of dollars in direct subsidies American taxpayers give to the maritime industry every year. But by supporting S. 47, this administration is proposing a subsidy of another kind that taxpayers will also end up paying--not as taxpyaers, in tax dollars, but as consumers, in higher prices.

We respectfully suggest that subsidies, whether direct or indirect, are not the solution to any problems the U.S. maritime industry might be experiencing. Rather, they are the cause of those problems. The maritime industry has become so accustomed to government subsidies that it has forgotten how to compete. Congress should therefore force both maritime management and maritime labor to compete by withholding its subsidies--both direct and indirect. If the industry knew that the government was not going to bail it out, it would become more efficient, and it would survive--and even prosper.

The CHAIRMAN. Next we will have a panel. Mr. Ed Merrigan is counsel for the National Association of Recycling Industries. Mr. Tom O'Neill is general counsel for the National Association of Beverage Importers.

I have got to go to the Armed Services Committee for a few minutes. I am going to request that the distinguished Senator from Ohio preside until I get back.

Senator METZENBAUM. Mr. Merrigan, we will be happy to hear from you.

STATEMENTS OF A PANEL CONSISTING OF EDWARD L. MERRIGAN, COUNSEL, NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC.; AND THOMAS E. O'NEILL, ESQ., COUNSEL, NATIONAL ASSOCIATION OF BEVERAGE IMPORTERS, INC., ACCOMPANIED BY DOUGLAS METZ

Mr. MERRIGAN. Thank you, Senator Metzenbaum. I want to thank the chairman and the committee for giving us the opportunity to appear.

I would like to have the prepared statement included in the record. I will just summarize the high points here.

Senator METZENBAUM. In view of the chairman's concern about the economics, I will say that is agreeable with this acting chairman, subject to veto by the real chairman.

Mr. MERRIGAN. Our basic position is that the National Association of Recycling Industries, which is the trade association for the metals, paper, textile, and rubber recycling industries and its 1,200 members, all of which are vitally involved in shipping those commodities both domestically and in foreign trade, are opposed to S. 47 as reported by the Commerce Committee.

I might say that we have spent the last decade trying to do something about discriminatory, unreasonable freight rates for the movement of these recyclable materials that are recovered from solid waste. Recycling, Senator, is vitally important to this country. Few people realize that 50 percent of our copper, about 50 percent of our lead, 30-odd percent of our aluminum, and equally substantial amounts of iron and steel, and 20 percent of our paper, comes from recycling. We are talking about industrial recycling now. We are not talking about the Boy Scouts that pick up the paper in the park. We are talking about the companies that use these materials and market them in foreign commerce.

Recycling is very important to the United States in three areas.

First of all, it is important, as I say, to the economy generally. If we did not have these materials, we would soon run out of raw materials. We would be putting a tremendous drain on our virgin resources, particularly metals, and we would be more reliant than we are now on foreign countries that are not too friendly sometimes for these commodities which are so vital to the United States.

Senator METZENBAUM. What kind of volume does the recycling industry do?

Mr. MERRIGAN. Every year, Senator, it runs into millions of tons of metals and runs into? millions of tons of paper.

Senator METZENBAUM. How about the dollar volume?

Mr. MERRIGAN. Well, you know, we are in a bad year to talk dollar volumes. If anything, it is so different from years gone by. It runs into the hundreds of millions of dollars.

This is a very significant business. There are 1,200 members of our association. There are about 2,000 members of the Institute of Scrap Iron and Steel all through the country. Our association includes the people that collect and process these recyclables and includes the companies that actually use these recyclable materials. In other words, it includes the metal companies and the paper companies that manufacture all sorts of products—aluminum, copper, lead, zinc, and so forth.

We have been concerned because, in order to have recycling, which operates not only to conserve resources but to conserve energy, you must have reasonable, nondiscriminatory freight rates. This is imperative if recyclables are to move from the solid waste stream to markets here in the United States and abroad.

We are also vitally concerned because all the cities and States are faced day in and day out with higher costs of recovering materials from solid waste. Solid waste disposal, landfills, and dumps, and hazardous waste have become a real problem to the country. So, recycling serves to alleviate those costs and alleviate those problems.

One of the big problems and the biggest drawbacks to recycling in years gone by has been transportation cost. For the last decade the Congress has thus tried to eliminate unreasonable, discriminatory freight rates for recyclables. Congress finally passed a law which required the railroads domestically to put a cap on rates on recyclables so that today a railroad cannot charge rates for the movement of recyclables that exceeds its cost for that traffic by more than 46 percent.

We have also been involved in a running litigation with the Pacific Westbound Conference, which is controlled largely by the large Japanese shipping cartels and other foreign carriers, to try to get the unreasonable, discriminatory freight rates for waste paper down to a reasonable level. A Federal Maritime Commission judge found those rates to be discriminatory, unreasonably high, detrimental to commerce and to the public interest. He was affirmed by the U.S. Court of Appeals here in Washington in 1980.

What I am trying to say is, as a result of the laws that have been passed by the Congress on rail transportation and as a result of this litigation against the ocean conferences, we are in the process of correcting these rate disparities against recycling. We are in a position now to gain all the benefits of recycling both here in the United States and with our trading partners abroad.

Now, here comes the Shipping Act of 1983, which really threatens to throw a lot of this in reverse.

Senator METZENBAUM. Do you have any idea of what percentage, would you care to pick a figure that you think might result in increased costs as a consequence of this legislation?

Mr. MERRIGAN. Our experience with the Pacific Westbound Conference and the Far East Conference is that really it is pretty much what the traffic will bear. Once they get into an absolute cartel position, I do not know what the price increases would be. We know there are going to be price increases. Our rate structure

has been such that—as I say, a judge of the Federal Maritime Commission found the rates to be outrageously high—to quote him exactly—detrimental to commerce, and contrary to the public interest.

We are in the process in two court cases of straightening out wastepaper rates today. I do not know what the future will bring for the shipment of recyclable metals overseas, or for the shipment of waste paper by other conferences, if Congress completely grants antitrust immunity to the foreign cartels that control these conferences and grants them freedom to charge whatever rates they want to.

Senator METZENBAUM. Is it not the fact that passage of this legislation could have a very negative impact upon our balance of trade because, if those rates are too high, you cannot sell your product and therefore you cannot export?

Mr. MERRIGAN. It would have a very serious impact because we would not be able to export. It would also have another serious impact because, if we cannot recycle, that means that some of these goods from the virgin side, which have to be imported, would have to be used in their place here at home.

Senator METZENBAUM. So, the figures that we have been using as to the costs being $3 billion, which would have to do with the increased cost of imports or exports, there might also be a hidden factor by reason of the inability to further export recycled products. That being the case, there would be a greater cost to the American manufacturers whose products are being recycled at the present time. Is that not the case?

Mr. MERRIGAN. That is absolutely true. Of course, that is why we are here today.

Senator METZENBAUM. Is it also not the fact that you have no alternative? You cannot just go out and get another ship.

In the Japanese cartel situation on the west coast, you had no place to go, did you?

Mr. MERRIGAN. That is true from time to time. Sometimes a competitor enters the field—but there are two ways this competition is controlled, of course. First of all, in order to get the lower rate with a conference, a shipper has to sign a dual rate contract. That gives the shipper a rate that is 15 percent lower. But the shipper has to do business with the conference. Therefore, the shipper is contractually bound to do that business, and he has no place else to go.

If a nonconference carrier enters the field and a shipper is not a party to the conference's local rate contract, that shipper can go nonconference. The conference then does everything in its power, of course, to knock that competitor out of the field—by lowering its rates, et certera, et certera.

One of the classical cases in this area is the Sabre case, which went the whole way to the Supreme Court. There Japan Lines and some of these other lines which are part of the conferences out in the West, combined together to drive Sabre out of business. Of course, they bankrupted Sabre.

This is one of the landmark cases S. 47 now purports to try to repeal—in fact the Senate Commerce Committee report says that the purpose of this statute is legislatively to overrule three Supreme Court decisions. One is the *Sabre* case. One is the *Carnation*

case, which involved the Pacific Westbound Conference, setting unlawfully high rates against the Carnation Co. The last is the *Svenska* case, which was another Supreme Court decision which required competition to be taken into consideration by the FMC when it approves agreements under the Shipping Act.

We have sort of gone along with this law up to this point because there is a provision in it that exempts our antitrust suit pending in California. In other words, we have pending litigation. This law says on its face that it does not apply to pending litigation. But now we come across a provision in this law which we did not realize was here until now. It is the provision which exempts totally under section 9 bulk cargoes and forest products from any of the tariff filing requirements.

Now, as far as waste paper is concerned, it has been repeatedly established in two cases by the court of appeals here in Washington that waste paper competes with wood chips, which is a bulk cargo, and wood pulp, which is a semifinished forest product, both here in the United States in paper manufacturing and in the Far East in paper manufacturing. By exempting bulk cargoes and forest products from the tariff filing requirements, that guarantees the big shippers of those commodities free and open rate and service competition by the carriers. No tariff has to be filed. No rates have to be established for the FMC to control or to look at. But all of our rates have to be fixed completely through combination through the conferences. With that type of situation we face in the future, not only in the waste paper area but in all the metals, the prospect of tremendous rate discrimination.

Our rates would be strictly fixed through tariffs filed with the FMC through the conferences, whereas our competitors, the great big companies that engage in the shipment of those materials, bulk cargoes, whether they be ore, concentrate or wood chips, they are free under this bill. So, at the very least we urge in this statement of ours, Senator Metzenbaum, that, if section 9 is to remain in the bill, recyclables be added to the provision as also exempt from tariff filing. But I think, more evenly, it would be better if all tariffs were not to be filed. When the administration originally proposed.

Senator METZENBAUM. Would it be better if we defeated the bill?

Mr. MERRIGAN. Would it be better if you defeated the bill? Yes, of course. But, if you cannot defeat the bill, I think it would be far better that you simply eliminate all tariff filing.

Senator METZENBAUM. Let me ask you a question, Mr. Merrigan. On behalf of Senator Byrd, I would like to ask you whether or not you have an opinion as to what impact of cost would result to the U.S. Government either through military or other contracts by reason of the passage of this bill?

Mr. MERRIGAN. No, I would not have an opinion on that. But I would imagine that the U.S. Government would be in the same position as most other shippers. They would have to deal on the same basis, I believe. But I would not want to venture an opinion.

Senator METZENBAUM. Does the Government not participate in recycled products?

Mr. MERRIGAN. The Government does not ship recycled products, to my knowledge.

So, in sum and substance, Senator, we take this stance. First of all, we feel the bill itself, at least the antitrust exemption part of the bill, should be rejected. If the antitrust exemption provisions have to stay in at all, then we think that the most damaging of those exemption provisions should come out. Certainly the one that says that rate fixing, whether or not included in an agreement which has been submitted to and approved by the FMC, should come out.

We think that tariff filing should be absolutely wide open. If there is going to be any exemption for bulk cargoes and any exemption for forest products, recyclables should be exempt because they have to compete with those commodities. But, I guess essentially I would have to go along with Drew Lewis, Secretary Drew Lewis, when he originally came to Congress and said, unless you eliminate tariff filing, we cannot support the bill. That was the administration's original position. I think we should go back to that position and say, if we are going to pass this bill in any form, we should eliminate tariff filing.

Senator METZENBAUM. Thank you, Mr. Merrigan.

Mr. MERRIGAN. Thank you, Senator.

[Prepared statement of Edward L. Merrigan follows:]

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC.
330 MADISON AVENUE / NEW YORK, N.Y. 10017 / (AREA CODE 212) 867-7330

STATEMENT OF

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC.

Mr. Chairman:

My name is Edward L. Merrigan. I am a member of the bars of the States of Louisiana, Maryland and New York; of the District of Columbia, the Supreme Court of the United States and numerous other courts in the federal system. I appear before the Committee today as counsel to the National Association of Recycling Industries, Inc., which opposes the Shipping Act of 1983 as reported by the Senate Commerce Committee.

THE NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES AND THE CRUCIAL ROLES PLAYED BY INDUSTRIAL RECYCLING BOTH HERE AND ABROAD

The National Association of Recycling Industries, Inc. (NARI) is the trade association for the nation's metals, paper, textile and rubber recycling industries. NARI's membership consists of more than 1,200 firms located throughout the United States — some large, some small, but all of which are engaged in either the collection, processing or industrial utilization of recyclable metals, paper, textiles and rubber here in this country, or in foreign trade with friendly nations abroad.

Industrial recycling is vital to our nation's raw materials supply and to our economy generally. Each year, America's recyclers recover millions of tons of ferrous and nonferrous metals, paper and rubber from solid waste. The recycling industry thus continuously supplies the United States, and its trading partners abroad, with critical portions of their total raw material needs. For example, presently about 50% of the nation's copper and lead is derived from recycling; as well as about 36% of its aluminum; 25% of its steel; 16% of its zinc and roughly 20% of its paper and paperboard. As

indicated above, additional tonnages are exported to meet the raw material requirements of our allies overseas.

Industrial recycling thus has a profound impact on the American economy. If recycling did not exist at current levels, there would not be enough raw materials to meet national demand. The result? Costs of raw materials would soar, our primary resources would be rapidly depleted, and the United States would be even more reliant than it is now on foreign imports for many of its basic resource needs.

Industrial recycling is also crucially important because —

1. Industrial use of recyclables conserves energy - When recyclables are utilized here or abroad in place of competing virgin raw material counterparts, vast amounts of energy are conserved: In the aluminum industry, the savings are 92%; in the copper industry, 85%; in iron and steel production, 65%; in lead manufacturing, 65%; in the paper industry, 64%; in rubber production, 71%, and in the zinc industry, 60%.

2. Industrial recycling reduces solid waste disposal costs and volumes - Metals, paper, textiles and rubber recycled from the solid waste stream automatically aid cities and states throughout the nation in the growing solid-hazardous waste disposal crisis. These materials recovered for beneficial reuse here and abroad, save millions of dollars a year in waste disposal costs for many of the larger metropolitan-industrial areas of the United States.

TRANSPORTATION COSTS HAVE A PROFOUND EFFECT UPON INDUSTRIAL RECYCLING BOTH HERE IN THE UNITED STATES AND ABROAD

Numerous federal studies have concluded that the ability of industries, both here at home and in friendly nations abroad, to utilize recyclable materials recovered from solid waste in the United States depends largely on the cost of transporting those materials from the waste stream to markets in this country and overseas. Indeed, several years ago, the National Commission

on Materials Policy concluded that "transportation costs determine how far recyclables can move, and often whether they move at all".

Thus, in many cases here at home and abroad, all the great benefits of industrial recycling are lost solely because transportation costs — rail, water or both — make it impossible to move the materials to waiting customers.

Worse yet, these same federal studies found that rail and ocean freight rates for the transportation of recyclable materials were almost always discriminatory, as well as unreasonably high. Thus, completely contrary to our nation's resource and energy conservation policies and the need to alleviate solid and hazardous waste disposal to the maximum, freight rates were discriminatorily operating at lower levels to encourage the depletion of scarce virgin materials, while competing recyclables were forced into landfills and dumps.

CONGRESS REPEATEDLY DIRECTED THAT ALL DISCRIMINATORY, UNREASONABLE RAIL FREIGHT RATES FOR RECYCLABLES BE ELIMINATED, AND BOTH A FEDERAL MARITIME COMMISSION JUDGE AND THE FEDERAL COURTS ORDERED THE REMOVAL OF UNREASONABLE, DISCRIMINATORY OCEAN FREIGHT RATES FOR RECYCLABLES

After conducting several House and Senate hearings on this subject, Congress passed three (3) successive laws mandating that all unreasonable, discriminatory rail freight rates for recyclables be removed by the ICC and the railroads.[1/] Each of these statutes was upheld by the federal courts.[2/] The last statute, enacted in 1980, placed a cap on all rail freight rates for recyclables, thus requiring the railroads to reduce their extraordinarily high, discriminatory rates to a level where the revenues they derived from such traffic would not exceed the costs of that transportation by more than 46%.[3/]

Meanwhile, a Federal Maritime Commission Administrative Law Judge ruled that the Pacific Westbound Conference, which is dominated by the Japanese shipping cartels (Japan Lines, Mitsui etc.) and other giant foreign carriers, had engaged

over the years "in ratemaking practices resulting in rates and charges on wastepaper which were so unreasonably high as to be detrimental to the commerce of the United States and the public interest" in violation of the Shipping Act.[4/] The FMC Judge concluded, at pg. 96 of his opinion:

> "First, in fixing wastepaper rates so unreasonably high as to be a detriment to commerce, PWC misused its conference agreement to contravene the regulatory purpose of section 18(b)(5). In employing its agreement so injuriously, PWC operated beyond the scope of the Commission's grant of partial immunity from the antitrust laws. The abusive use of the agreement operated to the detriment of the commerce of the United States and contrary to the public interest." (Emphasis Added).

The FMC Judge's decision was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit in 1980.[5/] The Court stated, at pg. 825:

> ". . . (I)t appears inescapable that unreasonably high shipping rates for wastepaper set by the PWC monopoly detract from United States Commerce in violation of section 18(b)(5) of the Act."

> THE SHIPPING ACT OF 1983, AS REPORTED BY THE SENATE COMMERCE COMMITTEE, NOW THREATENS TO ENABLE CONFERENCES, CONTROLLED BY MONOPOLISTIC FOREIGN SHIPPING CARTELS, TO ESTABLISH FUTURE RATES FOR RECYCLABLE MATERIALS WHICH WILL BE FAR MORE DISCRIMINATORY AND UNREASONABLE THAN THOSE OUTLAWED IN THE PENDING WASTEPAPER CASE

As stated above, when Congress enacted Section 204 of the Staggers Rail Act of 1980 and required every railroad in the nation to place a cap on domestic rail rates for recyclables, effective steps were finally taken by the I.C.C. and the railroads aimed at rectifying the existing rate structures without further delay.

Now, however, in 1983, Congress is inexplicably threatening to do just the opposite with reference to ocean freight rates for recyclable materials. While at the recycling industry's insistence, the Shipping Act of 1983, as reported by the Commerce Committee, makes it clear that neither the Act itself nor the amendments it makes to existing law shall be allowed to affect

the wastepaper cases already pending in California under the antitrust laws or in Washington under the Shipping Act,[6/] it contains other sweeping provisions that guarantee future monopolistic imposition of ocean rates for recyclables that will be at least as discriminatory, unjust and unreasonable as those heretofore ruled unlawful and contrary to the public interest in the wastepaper case, supra.

Thus, the Shipping Act of 1983 threatens to reimpose and perpetuate discriminatory, unreasonable rate barriers that will inhibit and prevent foreign trade in recyclable materials in the critical years ahead, and thereby cripple in the process our nation's resource and energy conservation efforts, as well as city and state programs designed to reduce solid waste disposal problems and costs through recycling.

Consequently, NARI and its members throughout the United States — hundreds of which have no alternative but to ship their recyclable materials overseas aboard the vessels of foreign cartels that already effectively control ocean freight rates through their monopolistic conferences — vigorously oppose the Shipping Act of 1983, and urge this Committee either to recommend its complete rejection by the Senate, or at least deletion or substantial modification by the Senate of the provisions we shall now discuss.

IT IS COMPLETELY IMPLAUSIBLE AND SENSELESS FOR CONGRESS TO GRANT NEW, SWEEPING ANTITRUST IMMUNITY TO FOREIGN SHIPPING CARTELS THAT ALREADY CONTROL THE BULK OF U.S. INTERNATIONAL OCEAN TRADE

Just three weeks ago, Senator Inouye, ranking minority member of the Senate Subcommittee on Merchant Marine, stated on the Senate floor:[7/]

> "Ninety-six percent of all U.S. international ocean trade is carried by foreign-flag vessels, only 4 percent of the tonnage coming in and out of the United States is carried in U.S. ships. . ."

Monopolistic foreign shipping cartels such as Japan Lines, Mitsui and those from Europe, the Middle East and other nations

also enjoy overwhelming majority control of most of the important U.S. shipping conferences such as Pacific Westbound Conference on the West Coast and the Far East Conference in the East — leaving most U.S. shippers in a position where they must either pay the high rates fixed by the monopolistic conferences or not ship at all.

Recent court cases demonstrate clearly that foreign shipping cartels that control the U.S. conferences have repeatedly utilized the conferences' monopoly power to crush non-conference competitors,[8/] and to engage in unlawful rate-fixing which has been exceedingly damaging to U.S. shippers.[9/] In 1979, three of the foreign cartels which operate in the United States-Europe trade were indicted, with three U.S. lines, for illegal rate-fixing under the Sherman Act. Pleas of nolo contendere were entered, and fines of up to $1 million each were imposed on the foreign cartels involved.[10/] U.S. shippers along the East Coast, in turn, from whom grossly illegal rates were gauged, settled their antitrust claims for $51,000.000,00.

How can Congress possibly justify granting sweeping, new antitrust immunity to these foreign cartels that already apparently control up to 96% of our foreign ocean commerce? Are they to be encouraged to take over 100% of U.S. foreign trade?

Why is it in the public interest to grant such sweeping immunity to foreign cartels that have already exhibited a tendency to use their monopoly powers to crush small competitors, and to exact high, unreasonable, unlawful rates from U.S. shippers?

The Senate Commerce Committee argues that "The U.S. merchant marine faces serious problems and is now at one of its historic low points in the percentage of cargoes in the U.S. export and import trades that it carries."[11/] Whatever the exact truth may be, the Shipping Act of 1983 will certainly "pull the plug" on the U.S. Merchant Marine — and leave it and all U.S. shippers at the uncontrolled mercy of the foreign carriers that already monopolize U.S. trade routes.

Accordingly, NARI submits that Section 8 of S. 47 entitled "Exemption From Antitrust Laws" should be deleted in its entirety. Certainly, Section 8(a)(1), which grants immunity to "any agreement or activity described in Section 4" —

> "whether or not filed and approved pursuant to Sections 5 and 6" —

should be dropped from the bill. Section 4 authorizes unregulated "rate-fixing", "pooling or apportion[ment] of traffic", and the outright "prevent[ion] of competition in international ocean transportation". Whatever might be said for giving these extraordinary rights to the few surviving U.S. flag carriers, it is plainly foolhardy at best to extend such new monopoly power to the aforementioned foreign shipping cartels.

DEREGULATION OF FMC CONTROLS REQUIRES STRENGTHENING, NOT WEAKENING, OF ANTITRUST LIABILITY

Section 20(a) of S. 47 proposes to repeal major regulatory sections of the Shipping Act, including, for example, Section 18 (b)(5) which prohibits unreasonably high rates. The bill substitutes other rate provisions at §§9(d), 10 which are essentially meaningless by comparison.

Thus, what is proposed here at one and the same time is (1) FMC deregulation and (2) elimination of all effective antitrust controls.

This, of course, is absolutely contrary to actions Congress recently took to deregulate the airline, trucking and railroad industries. In each of those cases, administrative deregulation was to result in free market competition — not new monopolistic rate-fixing combinations and conspiracies that are immune from the antitrust laws.

This should, we respectfully submit, be a matter of paramount importance to the Senate Judiciary Committee. If the antitrust laws are to be stricken from the books for any industry, the proposal should receive the fullest possible study and consideration of this Committee.

Consequently, for these reasons too, NARI urges the Committee to recommend the deletion of Section 8 from the bill; or at the very least that section should be redrafted to exclude sections (a)(1), (a)(3), and (a)(7). Such sweeping exclusions from the antitrust laws are patently improper in a statute which also broadly deregulates all other federal controls over an industry which has such a profound impact on the public interest and U.S. commerce.

> THERE IS NO SUSTAINABLE "NEED" FOR TOTAL ANTITRUST IMMUNITY HERE, AS THE SENATE COMMERCE COMMITTEE CONTENDS. MOREOVER THIS COMMITTEE, WITH FULL JURISDICTION OVER THE ANTITRUST LAWS, SHOULD NOT PERMIT THE COMMERCE COMMITTEE LEGISLATIVELY TO OVERRULE SUPREME COURT ANTITRUST DECISIONS WITHOUT FULL CAREFUL STUDY BY THIS COMMITTEE.

Section 15 of the Shipping Act already grants carriers and conferences of carriers a form of limited antitrust immunity which the courts have upheld in some cases. That "limited immunity" is clearly enough, and there is no "need" whatsoever for total immunity.

The Commerce Committee argues that, without total immunity, "the flexibility of the conference system" is restricted.[12/] But certainly such limitations are necessary when "conference flexibility" involves destroying competitors or fixing exorbitant, discriminatory rates for U.S. shippers!

The Commerce Committee states next that antitrust liability "has annoyed our international trading partners".[13/] All predators find restrictive laws "annoying", but where the ability of U.S. shipping concerns to operate and U.S. shippers to ship are involved, that is hardly an acceptable argument for a grant of total immunity to foreign predators.

Finally, the Commerce Committee asserts that U.S. carriers are totally exposed to U.S. antitrust liability while foreign flag carriers operating here are not. This is not true. As demonstrated hereinabove, foreign shipping cartels were recently indicted for Sherman Act violations in

our foreign commerce, and they were compelled to pay large criminal fines. Later, they were required to refund part of the illegal rates they collected to U.S. shippers.

Consequently, there is no real basis whatsoever for the Commerce Committee's arguments in this regard.

Finally, the national recycling industry prays that this Committee, which has direct jurisdiction over the antitrust laws of the United States, will not permit the Commerce Committee legislatively to overrule three (3) landmark Supreme Court anti-trust decisions in this area without first affording the most detailed comprehensive consideration to that proposition.[14/] Surely, that is a dangerous precedent to set, and if allowed, we can expect similar proposals from other committees of the Congress interested in exempting one segment or another of our society from federal laws enacted through this Committee and interpreted, after detailed consideration, by the Supreme Court.

THE SHIPPING ACT BALDLY DISCRIMINATES AGAINST SHIPPERS OF RECYCLABLES BY EXEMPTING EXCLUSIVELY SHIPPERS OF BULK CARGO AND FOREST PRODUCTS FROM THE TARIFF FILING REQUIREMENTS. AS ORIGINALLY PROPOSED BY THE ADMINISTRATION, ALL TARIFF FILING REQUIREMENTS SHOULD BE DELETED IN ORDER TO PROMOTE OPEN RATE AND SERVICE COMPETITION AMONG CARRIERS.

Section 9 of S. 47 exempts bulk cargoes and forest products in an unfinished or semifinished state from the tariff filing requirements of the bill. No such exemption is provided for recyclable materials.

It has been judicially established, however, that recyclable wastepaper regularly competes in the ocean trades with virgin woodchips (a bulk cargo) and semifinished woodpulp (a semifinished forest product). All three commodities are competing raw materials in the paper manufacturing industries here in the United States and abroad.[15/]

Similarly, it has been judicially established that other

recyclable commodities, such as metals and rubber, regularly compete with their virgin ore or concentrate counterparts (bulk cargo).[16/]

Thus, by exempting the competing virgin materials from all the tariff filing requirements of the bill, S. 47 has assured that to a major degree, there will be free, open competition among carriers for rates and services on these commodities, while all rates on competing recyclables will continue to be set, in combination and conspiracy, by the monopolistic conferences.

This completely guarantees continuing high rates for recyclables, far lower rates for competing shippers of virgin woodchips and woodpulp. In other words, this alone assures continuing, even more oppressive rate discrimination against shippers of recyclables.

When S. 47's predecessor was before the Congress last year, the Administration, with Secretary Drew Lewis in the lead, made elimination of all tariff filing requirements the quid pro quo for any extension of existing antitrust immunity for conferences. This, Secretary Lewis argued, would at least promote free, open market competition among carriers, and eliminate monopolistic conference control over rate-fixing. Originally, the Administration refused to support any bill in this area that did not eliminate all tariff filing by conferences.

NARI respectfully urges this Committee to reinstate that requirement, especially to the extent of including recyclables in the Section 9 exemption, if bulk cargoes (virgin ores and woodchips) and forest products (woodpulp) are to remain exempt.

CONCLUSION

There are several other reasons why the Shipping Act of 1983 should not be passed at this time. However, NARI has set

forth the major points which make the legislation completely unjust, unfair, unacceptable and just "bad law" in its present form. If the U.S. shipping industry genuinely wants to be deregulated so that open market conditions and competition can be fully restored to its operations, that can be accomplished through relatively minor amendments to the Shipping Act — principally through the elimination of tariff filing requirements.

As indicated above, the carriers already enjoy a generous limited statutory exemption from the antitrust laws, and no case whatsoever has been produced by them to warrant a total exemption.

For all the reasons outlined above, the national recycling industry urges the Judiciary Committee to recommend rejection of the Shipping Act in its present form in favor of a new impartial study of what is needed honestly and fairly to deregulate the industry and revitalize the U.S. Flag Merchant Marine. There are many appropriate actions the government can take in that direction which will not necessarily require the complete elimination of competition and the devastation of U.S. shippers, especially small U.S. shippers.

F O O T N O T E S

1/ See 49 U.S.C. 10710, entitled "Elimination of discrimination against recyclable materials" (P.L. 93-236, §603, 1974; 49 U.S.C. 10731(a)-(d), entitled "Investigation of discriminatory rail rates for transportation of recyclable or recycled materials" (P.L. 94-210, §204, 1976; 49 U.S.C. 10731(e), P.L. 96-448, §204, 1980.

2/ National Association of Recycling Industries v. I.C.C., 585 F.2d 522 (1978), cert. denied 440 U.S. 929 (1979); National Association of Recycling Industries v. I.C.C., 627 F.2d 1328 (1980); National Association of Recycling Industries, Inc. v. I.C.C., 660 F.2d 795 (1981).

3/ See 49 U.S.C. 10731(e).

4/ FMC Docket No. 72-35, Pacific Westbound Conference, Wastepaper and Woodpulp From U.S. To Far East, 8/15/77.

5/ National Association of Recycling Industries, Inc. v. F.M.C., 658 F.2d 816, 823, 829 (1980).

6/ See S. 47, 98th Cong., §20(e)(2), p. 53.

7/ Cong. Record, 1/26/83, pg. S. 603.

8/ Sabre Shipping Corporation v. American President Lines, Ltd., 285 F. Supp. 949, appeal dism. 407 F.2d 173, cert. denied. 395 U.S. 922.

9/ Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213; NARI v. FMC, supra; Ocean Shipping Antitrust Litigation, 500 F. Supp. 1235.

10/ U.S. v. Atlantic Container Line, Ltd., et al, Crim. Case No. 79-271, D.C., D.C.

11/ S. Rep. 97-414, 97th Cong., 2d Sess., pg. 2.

12/ See S. Rep. 97-414, pg. 7.

13/ Id., p. 7.

14/ Id. at pg. 8. The Commerce Committee proposes to overrule the Carnation, Sabre and Svenska decisions.

15/ See NARI v. F.M.C., supra, at 658 F.2d 827, 828.

16/ See NARI v. I.C.C., supra, at 627 F.2d 1334, 1335.

Senator METZENBAUM. Next we will hear from Mr. Tom O'Neill.

Mr. O'NEILL. Good afternoon, Senator. May I call Mr. Douglas Metz to the table, who associates himself generally with my remarks? He represents the customers of Alcoholic Beverage Importers.

Senator METZENBAUM. Does that include beer, whisky?

Mr. O'NEILL. Beer, wine, and spirits, so, all alcoholic beverages imported into the United States are represented in our association.

For the record, I am Tom O'Neill, general counsel for the National Association of Beverage Importers. I will refer to this hereafter as NABI. This is the national trade association, as I indicated, that represents the major portion of the importers of wine, spirits, and beer.

We have 100 companies in our membership. A list of our membership is attached to the statement.

I think the record should show that Heublein, which is listed in this membership, does not subscribe to the NABI position. They are involved with the shipping lines. In all fairness to them, I wish that the record would show that they be disassociated and opposed to my statement.

I am going to try to summarize this because I have a ponderous document before you. I am just going to hit the high points.

Senator METZENBAUM. We are under the pressure of time, so we would appreciate that.

Mr. O'NEILL. I understand that, and I was told so earlier.

Senator METZENBAUM. Without objection, your prepared statement will be inserted.

Mr. O'NEILL. I would like to look at our first page here. On behalf of NABI and the members of NABI, we strongly oppose this sweeping antitrust immunity for ocean carriers and conferences proposed in S. 47.

We support the provisions of this bill which would authorize shippers' councils, but this is really a fallback position based upon the need for some tool to deal with the carriers under increased aloofness and failure to deal with us and the prospective power when armed with this new authority if this bill goes through.

Our objection is double-barreled in that we object, as other witnesses have stated, to section 4(a) of the bill, which has to do with pooling of earnings and other things. I would point out that we object to this without the current Public Law 87-346, public interest test. Really, there is nothing new in this antitrust exemption under section 4 that is not permitted under in section 15 right now, but the only point that we should all be aware of is that the carriers now have to justify their antitrust activities. Under this bill, they would not. So, we object to this on general antitrust grounds.

Second, we object to section 8(a)(1) of the bill, which I now understand this afternoon has been amended. As I have it, it says that any agreement or activity described in section 4 whether or not filed and approved pursuant to section 5 and 6. Apparently, from what I hear, the House-passed version with reference to a reasonable belief is now inserted in this section. But it did not improve the situation because carriers could still come forth to the Federal Maritime Commission, merely file these agreements without going through the public interest test.

Obviously, this is a carrier bill. It is not a shipper's bill.

I just recall in this context a somewhat offhand comment. I received a bathrobe for Christmas. It says: One size fits all. Now, this, in addition to being a terrible tailoring problem, is applicable to this situation. If this bill is designed to help everybody, it certainly does not help me. It does not help my members. It does not fit any of our members. So, it is a carrier bill. I can find nothing in it of any benefit to shippers.

In my statement on page 2, I am talking about the previous conspiracy of the carriers, to which I will merely allude, quite obviously. I merely want it in the record, particularly at section 35, where they set forth all the actions the carriers engaged in which caused the antitrust indictment in 1979.

I would point up the fact that this bill would authorize these very activities for which they were indicted. I say that if we look at that, the proper title of this bill would be a bill to forever protect the carriers from antitrust immunity. As a matter of fact, before the Judiciary Committee of the House of Representatives Mr. Klein of Sea-Land stated that this was the primary objection of the carriers in moving this bill forward, to get rid of the antitrust surveillance by Justice.

Senator METZENBAUM. Mr. O'Neill, let me ask you a question.

Mr. O'NEILL. Yes, sir.

Senator METZENBAUM. This bill flew through the House with about 30 Members voting against it in the last session. There were some games played at the time. My question to you, Mr. O'Neill, is, you represent a very big section of the American economy. You have got beer distributors. I heard from so many beer distributors when I was holding up their antitrust exemption bill. They even wrote me a letter saying I was not going to get any campaign funds

if I did not stop holding up their bill. And I did not stop holding it up, and I did not get any of their campaign funds.

The fact is they were loud, and they were exercised. We have wine companies in Ohio. The spirits distributors in this country are a potent force. I hear from them in connection with other matters pending in the Congress.

Where are they with respect to this matter other than the fact that they have sent their general counsel up to speak against it? Beyond that, I have not heard from them. To the best of my knowledge, I do not know of many Members of the Senate who have heard from them. And this bill is coming up on the floor next Tuesday, Wednesday, or as soon as possible.

Mr. O'NEILL. The timeframe on this has been extremely restrictive. I have to apologize that I have not been able to gear up more members. We talked about getting in contact with the Senators, and everybody is against this bill, but getting your constituents to report in is somewhat of a job for a trade association executive. It is, let George do it, unfortunately.

Senator METZENBAUM. Let me ask you a question. How much do you think your prices will go up if this bill passes? Take a guess. You cannot have any accuracy because it is subject to the cartel. But what would——

Mr. O'NEILL. Not to beg your question, but, as Mr. Edwards said, in his dissent from the House Judiciary Committee, we need to study the impact and quantify this bill. Somebody has said several billion dollars. As far as our industry is concerned, if you get a price rise of 20 percent, it is going to be magnified through Mr. Metz's customers as they mark everything up three times. So, it is a guess. You might be talking up to 20 cents a bottle on spirits, something like that, at the retail level, or maybe higher.

Senator METZENBAUM. What kind of volume does your industry do?

Mr. O'NEILL. We are way over the billion dollar level on imports, but that is the naked cost.

Senator METZENBAUM. By the time you get done and the importers pass it on to the distributors, the wholesalers, and then they mark it up because there is a percentage markup, your costs just multiply. The American consumer winds up paying more.

Mr. O'NEILL. Yes, sir.

Senator METZENBAUM. Thank you very much, Mr. O'Neill. I appreciate your comments.

Mr. O'NEILL. Could I take one more minute to summarize on something?

Senator METZENBAUM. Yes.

Mr. O'NEILL. You had asked earlier for some comments on changes in the bill. I would only like in conclusion to call to the attention of the committee the different tests which appear in this bill. I call your attention to pages 30 and 40 of the bill, where we are talking about controlled carriers. Whenever the Commission is of the opinion that rates, charges or classifications of a controlled carrier are unreasonable, they can issue a show cause order. And they can cancel their rates.

What rights do we have under this bill? We can file a complaint with the Commission alleging a violation with this act. This ap-

pears on page 40, line 21. What is the action that the Commission would come forth with on this? The Commission shall furnish a copy of the complaint pursuant to subsection (a) to the person named therein who within a reasonable time shall satisfy the complaint and answer it in writing. If the complaint is not satisfied, the Commission shall investigate in an appropriate manner and make an appropriate order.

There is absolutely nothing here that would mandate anything from the Commission as far as a judicial standard.

Senator METZENBAUM. Mr. O'Neill and Mr. Merrigan, I will say this to both of you. Your testimony is informative. Your testimony is helpful. There is one U.S. Senator listening to it, and I am already opposed to the bill. Now, I can only say to you that in the American political scene the American business community has come to learn that they have got to activate their people back home if they are to have any impact down here.

Today is Thursday. If you want to have some impact on this legislation, you are not having it by speaking to me and, when Senator Thurmond is here, speaking to him, because both of us have concerns about this legislation.

I just would urge you to use telegrams and telephones and whatever to let your people back home understand the impact of this bill, if it is as bad as you say it is and will have the impact that it will have on your industry, and tell them to respond to their U.S. Senators by Monday or Tuesday at the latest.

Absent that, you have made a great speech and you may have earned your fee, but you have not made much difference as far as this legislation is concerned.

Mr. O'NEILL. I appreciate that.

Senator METZENBAUM. Thank you very much.

Mr. O'NEILL. May Mr. Metz just submit for your information a list of his members?

Senator METZENBAUM. Sure. He would do better if he would take the list home with him and get them working on their Senators. But we will be glad to have the list.

[Prepared statement of Thomas E. O'Neill follows:]

POSITION OF NABI ON S. 47

1. IDENTIFICATION OF PETITIONER

I am Thomas E. O'Neill, General Counsel for the National Association of Beverage Importers, Inc., hereafter NABI. It is the national trade association representing the interests of importers of wines, spirits, and beer, and comprises in its membership over 100 companies. A membership list is attached.

2. NABI POSITION

On behalf of its members NABI strongly opposes the sweeping antitrust immunity for ocean carriers and conferences proposed in S. 47. While NABI supports the provisions of this bill which would authorize shippers' councils, this is a fall-back position based on the need for some tool to deal with the carriers under their increased aloofness and prospective power when armed with what would amount to complete immunity from antitrust laws.

Our objection is double-barreled in that NABI objects to the anticompetitive nature of Sec. 4(a) of the bill which would increase the scope of activities permitted to the carriers, and particularly the following:

> (2) pool or apportion traffic, revenues, net losses, or net profits;
> (3) allot ports or restrict or otherwise regulate the number and character of sailings between ports;
> (4) limit or regulate the volume or character of cargo or passenger traffic to be carried;
> (5) engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or non-vessel-operating common carriers;
> (6) control, regulate, or prevent competition in international ocean transportation. . .

These activities openly encourage anticompetitve conduct. We oppose such increased authority on general antitrust grounds. Our objection becomes fevered when these authorized activities are viewed in the context of Sec. 8(a)(1) of the bill which states:

> (a) The antitrust laws do not apply to--
> (1) any agreement or activity described in section 4, whether or not filed and approved pursuant to sections 5 and 6, and whether or not exempted from any requirement of this Act pursuant to section 18.

While the bill makes a pretext of regulatory surveillance over the activities of the carriers by the FMC, such surveillance would be sterilized by the complete immunity of the carriers under the foregoing section. Antitrust immunity would not be limited to conduct approved by the FMC, as it has been since the passage of the original Shipping Act of 1916, but antitrust immunity would be granted to covert activities of the carriers.

Without the authority of the Justice Department to proceed against the carriers the door for private damage suits would be effectively barred.

3. PREVIOUS CONSPIRACY OF THE CARRIERS

Operating under their present antitrust exemption which requires the filing of agreements under Section 15, carriers and conferences have been notably remiss in abiding by filing requirements. A case in point is U.S. v. Atlantic Container Line, et al., Crim. No. 79-00271.

The background of this case discloses that in the early 1970's, alcoholic beverage importers, through the NABI Freight Committee, attempted to investigate the possibility of chartering, or making arrangements to aggregate cargo for one or more independent carriers. At one point, an independent carrier seemed on the verge of posting a favorable rate for wines and spirits. However, almost overnight this rate disappeared.

There were in existence at that time three rather strange rate agreements in the United States/Europe trade. These were (1) the Westbound 48-Hour Rate Agreement (FMC Agreement 9427); (2) the Eastbound 48-Hour Rate Agreement (FMC Agreement 9552); and (3) the South Atlantic/North Europe Rate Agreement (FMC Agreement 9984). These agreements provided that independent carriers, in this instance, Baltic Shipping Lines, Polish Ocean Line, Finnlines, and Meyer Line, should give the North Atlantic Westbound Freight Association 48-hour notice of proposed rate changes.

It is obvious that the Westbound 48-Hour Agreement provided a vehicle for the carrier members of the North Atlantic Westbound Freight Association to squelch competition.

The situation caught the attention of the Justice Department in 1974. After preliminary investigation, the United States Department of Justice issued Civil Investigative Demand No. 1643 in August of 1975. The Civil Investigative Demand involved "restraint of trade with respect to transportation of alcoholic beverages from Europe to the United States." Extensive investigation by the Justice Department of this industry resulted in presentation of charges of violation of the antitrust laws by the shipping lines, and various named individuals. On June 1, 1979, a Federal Grand Jury indicted 5 corporations, 2 groups of shipping firms, and 13 individuals on charges of conspiring to fix prices of the ocean transportation of freight between the United States and Europe. On June 8, 1979, pleas of nolo contendere were accepted by the Court, and a total of $5.4 million in fines was imposed on the shipping lines in the case of U.S. v. Atlantic Container Line et al. A copy of the indictment is attached for ready reference of the Committee.

In addition to this criminal disposition, final settlement is currently pending in the United States District Court in the Southern District of New York of a Class Action brought as a result of the antitrust violations by the carriers. There is a settlement fund of $51,395,000 which the various carriers have funded in order to compromise, rather than defend this action.

The conspiracy is outlined in the attached indictment. Note particularly paragraph 35, beginning at page 15 of the indictment, as follows:

> 35. In furtherance of the aforesaid combination and conspiracy the defendents and unindicted co-conspirators have done those things that they combined and conspired to do, including among others:
>
> (a) Established, without the approval of the Commission, committees, including a Senior Management Committee (SMC), which reported to the heads of the lines ("Principals"), and a Pricing Policy Committee (PPC), each composed solely of the seven lines, to fix rates, charges, and other factors directly affecting price levels to be charged by the seven lines for the transportation of freight in the United States/Europe trade. These committees met periodically during the course of the conspiracy including during the year 1974 and into 1975.
>
> (b) Set and implemented through these committees, without approval of the Commission, revenue targets for the operations of the seven lines in the United States/Europe trade. These targets were known as the "Revenue Plans."
>
> (c) Set rates, charges, and other factors directly affecting price levels, without the approval of the Commission, for the ocean transport of freight in the South Atlantic trade, by,

among other methods, agreeing that rates in the South Atlantic trade would be equalized with rates in the North Atlantic trade and that each defendant line that was a party to SANE would not exercise its right of independent action.

(d) Set rates, charges, and other factors directly affecting price levels for the shipment of cargo in the United States/Europe trade via Canada when there was no approved Section 15 agreement permitting such activity.

(e) Established several related agreements between the seven lines and various independents, without the approval of the Commission, to fix rates, charges, and other factors directly affecting price levels for the ocean transportation of freight in the United States/Europe trade, including a fixed spread, or differential, between conference rates and the independents' rates. Some of these agreements included the "Working Objectives" and the "Restraint Program." At times, these agreements included an agreement not to exercise the right of independent action available to the parties to the Eastbound 48-Hour Rate Agreement and the Westbound 48-Hour Rate Agreement.

(f) Filed with the Commission tariffs and tariff revisions that were the product of the combination and conspiracy.

(g) Refrained from informing the Commission about the conduct set forth in (a)-(f) above, in contravention of the requirements of conference, rate, or discussion agreements, the rules of the Commission, or Section 15, by, among others, the following acts:

(i) Refrained from filing minutes of various meetings where agreements to fix rates, charges and other factors directly affecting price levels in the United States/Europe trade were reached.

(ii) Filed minutes with the Commission that were certified to be true and complete, or otherwise attested to, purporting to describe meetings held, but which minutes did not disclose discussions had and agreements reached at those meetings to fix rates, charges and other factors directly affecting price levels in the United States/Europe trade.

The obvious reason why these agreements were never filed with the Commission was that they would not have been granted sanction.

4. REAL PURPOSE OF S. 47

S. 47 is captioned as a bill "To improve the international ocean commerce transportation system of the United States." It might be more properly titled as a bill "To protect forever ocean carriers from prosecution under the United States antitrust laws." Among other things, this bill would grant the carriers license to carry on all the activities outlined above which subjected them to criminal and civil sanctions.

5. PREVIOUS CONGRESSIONAL STUDIES DISCLOSE RANK ABUSE OF CARRIER PRIVILEGES

Attached as Exhibit A is an excerpt from the Report of the Antitrust Subcommittee of the House Judiciary Committee on the Ocean Freight Industry. Although 21 years old, this report generally reflects the current activities of the carriers. Particular attention should be given to page 391 concerning "Gentlemen's Agreements":

The most disturbing group of abuses uncovered by this subcommittee's investigation was the prolifery of unlawful "gentlemen's agreements" employed in U.S. foreign commerce. The evidence indicates that on every trade route virtually every carrier operating in American foreign commerce enters into and follows such gentlemen's agreements as a matter of course.

This practice strikes at the very heart of our shipping laws and policies. The antitrust exemption granted to the maritime industry by Section 15 of the Shipping Act, 1916, is predicated upon the assumption that U.S. maritime agency concerned (presently the Federal Maritime Commission) will have an opportunity to approve or disapprove any anticompetitive device employed by persons subject to the act whether or not an antitrust exemption is actively sought. The cornerstones of this section of the act are notification and Government approval. Without these prerequisites no antitrust exemption is possible and moreover those who fail to notify the agency are subject to severe penalty.

But the vice of these gentlemen's agreements goes further. They not only withhold from regulatory scrutiny the various anticompetitive practices for which Congress intended scrutiny, the antitrust laws, but they are also commonly used to effectuate arrangements which the Shipping Act prohibits outright -- deferred rebates, fighting ships, unreasonable preferences, retaliatory schemes and unjustly discriminatory rates and charges.

1. Accordingly, this subcommittee believes it most urgent that section 15 be vigorously enforced. The new Commission should make every effort to ferret out gentlemen's agreements. Trade journals, conference minutes, and memoranda, tariff filings, and correspondence with the Commission should be thoroughly and carefully studied for any suggestion that unfiled agreements exist or are being effectuated. Unless more vigorous and effective law enforcement and more universal voluntary compliance can be brought about, some system other than filing and approval of agreements by a Federal agency will be devised to protect the people of the United States from economic predators here and abroad.

2. In addition the subcommittee recommends that the Federal Maritime Commission use broadly the new power over section 15 agreements given it under Public Law 87-346. The new law adds the requirement that before approving section 15 agreements the Commission must find them not "contrary to the public interest." The subcommittee recommends that pursuant to this authority the Commission should consider the history of compliance of the various steamship lines and conferences with respect to the shipping laws in connection with granting or withholding approval of section 15 agreements.

We recommend further that the Commission use this new power to insure generally that future agreements approved under section 15 redound to the overall benefit of the American public, not merely to that of the maritime industry alone.

3. The responsibilities of the Department of Justice in this area should not be overlooked. Where persons subject to the Shipping Act, 1916, have failed to file or secure approval of agreements that violate the antitrust laws, these practices should be criminally prosecuted by the Antitrust Division of the Department of Justice, irrespective of what action, if any, the Federal Maritime Commission decides to take. Amendments to section 15 of the Shipping Act, contained in Public Law 87-346, were intended to make clear the separate coordinate responsibilities of the Department of Justice in this regard. In addition, where persons subject to the act have violated section 15 and have become subject to the punitive provisions of that section imposing penalties of not more than $1,000 per day, it is

> the clear responsibility of the Department of Justice to bring suit for the recovery of these amounts in civil actions. This the Department has failed to do in the past but it is urgently recommended that its duties under this section be more vigorously followed in the future. . . (underlining supplied)

6. CARRIERS SEEK REMOVAL OF SVENSKA TEST

Operating under the Congressional mandate of Public Law 87-346, as outlined in paragraphs 2 and 3 above, the Federal Maritime Commission on occasion has insisted on public interest justification. This has not been required in all Section 15 filings, but only in those few where the issue of public interest has been open to question. On March 6, 1968 the U.S. Supreme Court decided the case of FMC v. Svenska Amerika Linien, 390 U.S. 238 (1968). At issue was the FMC public interest test that:

> . . .conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can "bring forth such facts as would demonstrate that the rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.

Addressing this test the Supreme Court held:

> By its very nature an illegal restraint of trade is in some ways "contrary to the public interest," and the Commission's antitrust standard, involving an assessment of the necessity for this restaint in terms of legitimate commercial objectives, simply gives understandable content to the broad statutory concept of the public interest. . . It is not unreasonable to require that a conference adopting a particular rule to govern its own affairs, for reasons best known to the conference itself, must come forward and explain to the Commission what those reasons are. We therefore hold that the antitrust test formulated by the Commission is an appropriate refinement of the statutory "public interest" standard.

If the application of the Svenska test is onerous to the carriers, the actual test itself remains reasonable. Perhaps the burden of proof could be shifted somewhat to the Commission in line with the concurring opinion of Mr. Justice Harlan:

> I concur in the result reached by the Court, substantially for the reasons stated in the Court's opinion. However, I cannot join in the Court's general statements, ante, at 1077, concerning the relationship between the antitrust laws and the "contrary to the public interest" standard of Section 15 of the Shipping Act. It seems plain that the "contrary to the public interest" test was intended to comprehend factors unique to the shipping industry as well as those embodied in the antitrust laws. Hence, I believe that under the Act the Commission may not place upon a shipping conference the burden of justifying an agreement until the Commission has determined that in light of both shipping and antitrust factors the agreement would be "contrary to the public interest" in the absence of further explanation.

7. CARRIERS DISTORT THE BURDEN OF FILING AGREEMENTS

Under current law at least 95% of all agreements submitted to the Federal Maritime Commission are approved. Most of these agreements are approved very

quickly. Those that are disapproved are so treated because the agreement has no justification, except to eliminate competition. Accordingly, the statutory time limit for action on agreements under Sec. 6 of S. 47 confers a benefit to the carriers which is illusive in regard to the vast majority of agreements which are currently approved automatically. As to the remaining 5%, the statutory time limit confers upon the carriers a method for expeditious approval of agreements which would be unjustified under current law.

The October 1982 Federal Maritime Commission index of approved agreements contains a list of all agreements currently in force. Particular attention should be given to Sec. 7, listing agreements for pooling, and Sec. 9, concerning cooperative working arrangements. Typical of cooperative working agreements is that of Agreement 9978 which binds together the various conferences serving the North Atlantic in an agreement to provide for "The maintenance of common administrative, policing, and enforcement facilities and discussion and acting upon a broad range of non-ratemaking matters."

Under the new law, this and other similar agreements would remain in effect. S. 47 does not contain any cleansing procedure which would mandate the refiling of previously approved agreements. In effect, this bill would immunize the carriers against effective scrutiny by the Justice Department or other parties on both new and previously filed agreements.

8. THE PROPOSAL FOR INCREASED ANTITRUST IMMUNITY RUNS COUNTER TO CURRENT APPRAISAL

A. General Accounting Office Report

On July 2, 1982, the General Accounting Office issued a report (GAO/PAD-82-11) on the international oceanliner shipping industry. It is significant that this study does not indicate the necessity for revision of the Shipping Act. The following excerpts from this report quantify the U.S. liner situation:

> One major reason given for revising the Shipping Act is concern about the condition of the U.S. flag liner fleet. Despite considerable Federal assistance, a number of factors indicate that the general cargo liner segment of the U.S. merchant marine may be in serious trouble: the number of U.S. flag general cargo vessels declined from 523 in 1970 to 256 in 1980; the relative size of the United States general cargo vessel fleet (in terms of deadweight tons) fell from second in the world in 1965 to eighth in 1979, and the number of U.S. flag liner carriers declined from 19 in 1970 to 9 in 1980.
>
> The evidence shows, however, that these developments are, in large part, attributable to the combination of a stagnant volume of U.S. liner cargoes and the rapid adoption of container handling technology by U.S. flag liner companies. Thus, it appears that the U.S. flag liner fleet is not in a state of general distress significant enough to justify a major revision of the Shipping Act.

Table Three of the report bears out the fact that the percentage share of U.S. flag vessels in terms of liner cargoes declined in the early days of containerization, but since 1970 has been building up again. An excerpt from this table is as follows:

Average Annual U.S. Flag Share of Ocean Liner Cargoes
1956-1978

Years	Avg. Annual Values of Liner Cargoes	U.S. Flag Share Value of U.S. Liner Cargoes	% Share
1956-60	($ Billions) 16.5	($ Billions) 5.9	35.8
61-65	20.1	6.2	30.8
66-70	27.4	8.0	29.1
71-75	49.4	14.7	29.7
76-78	85.9	25.9	30.1

On the issue of the decline in the number of U.S. shipping companies, the following is the General Accounting Office report conclusion:

> We found that the decline in the number of vessels and the relative position of the U.S. flag fleet were largely due to adopting a highly efficient containerized cargo handling technology (Containerization) and did not appear to be a sign of chronic distress. . . Our conclusion (is) that there is no evidence of any systematic, industry-wide distress and that company-specific factors, such as size, ship type, and route system are more important than the regulatory system in determining the financial performance of U.S. flag operations. . . The U.S. Maritime Administration's recent analysis of the U.S. flag liner companies supports (the) conclusion that the U.S. flag liner fleet is not in a state of financial decline. . . It states that the majority of operators "have shown improved earnings in 1980 over 1979," and that overall 1980 was a relatively good year for the industry with industry net profit increasing 539 percent, total industry assets increasing 9.7 percent, and total liabilities decreasing.

The report goes on to indicate that U.S. costs are the prime reason for competitive disadvantage with foreign flag vessels:

> What puts U.S. flag carriers at a competitive disadvantage compared with foreign flag liner operators is not so much current regulation as the fact that U.S. flag operators are among the highest cost carriers in the world.

B. House Republican Research Committee Recommendations

The July 14, 1982, report of the House Republican Research Committee goes far beyond any other recommendations. The conclusion states:

> The United States should ignore pleas to strengthen shipping cartels in order to permit greater than competitive profits. Strengthened shipping cartels would require heavy government regulation by the FMC to provide minimal protection for consumers from non-competitive practices. Instead, the U.S. should not permit conferences in U.S. trades, deny antitrust immunity to operators, remove most FMC regulation and rely on the competitive forces of the market place to ensure more efficient and less costly oceanborne transportation service. Deregulation of the U.S. maritime industry will no longer protect inefficient lines and will permit innovative, cost-conscious firms to flourish. Technological leaders such as Sea-Land Service, Inc., the only unsubsidized U.S. flag liner, in FY 1981 had the most number of flagships (47) and the

highest gross revenue ($1,413.7 million). In the liner trades, U.S. liner companies have approximately a 30% share of the total U.S. export and import markets, and advances in technology can improve that position.

9. THE HOUSE JUDICIARY COMMITTEE RECOMMENDS A STUDY COMMISSION

On July 30 the House Judiciary Committee issued its report on H.R. 4374 (H. Rpt. 97-611, Part 2). This report contained recommendations for a new Sec. 18 to the bill which would have established a "commission on the deregulation of intermodal ocean shipping." A copy of this section is appended as Exhibit B.

NABI supports the concept of a study commission. However, in light of the conclusions of the GAO report, the Celler Report of 1962, and other studies containing negative recommendations for further carrier antitrust immunity, the Commission should study the ocean shipping situation before, and not after this legislation is passed.

10. NABI AGREES WITH THE DISSENTING VIEWS ON H.R. 4374

Pages 45 through 49 of House Report 97-611, Part 2, set forth the dissenting views of Don Edwards and other Congressmen. We call particular attention to the following:

> The bill provides antitrust exemption to an industry whose history is replete with every form of anti-competitive action. Unlike the tankers and bulk carriers, the liner companies have for more than a hundred years practiced cartelization with monopolistic rates, predatory practices, discrimination and retaliation against shippers and independent liner companies who have failed to acquiesce in the cartels' control of the various international trades. Although the Committee has wrestled with these problems and has adopted a number of amendments, some of which modify or eliminate a few of the worst of the deficiencies in H.R. 4374, it is still objectionable and unsound and should be defeated. The members of the Judiciary Committee appeared to be virtually unanimous in their concern about the inadequacy of the time available to us for consideration of this sweeping legislation. . . Further, there has been no serious analysis of the impact of the bill on ocean freight rates. Consequently, with no opportunity for serious study of the subject by our own committee, we have approved a piece of legislation that can be expected to increase shipping costs of American trades by some billions of dollars annually.

11. NABI RECOMMENDATION

We realize that the focus of the Senate Judiciary Committee's interest in S.47 is to make recommendations for specific changes in the bill.

Because NABI's opposition to increased antitrust exemption for the carriers goes to the heart of this bill we regret our inability to come forward with concrete suggestions at this time.

We can only hope that reason will dictate the need for further study of S. 47 before passage is attempted.

Thomas E. O'Neill
General Counsel
National Association of
Beverage Importers, Inc.
1025 Vermont Avenue, N.W.
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Washington, D.C. 20005

17 February, 1983

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. ATLANTIC CONTAINER LINE, LTD., DART CONTAINERLINE COMPANY LIMITED, SEA-LAND SERVICE, INC., SEATRAIN LINES, INC., HAPAG-LLOYD AKTIENGESELLSCHAFT, UNITED STATES LINES, INC., and AMERICAN EXPORT LINES, INC. Defendants	)	79-00271 Criminal No. Filed: 15 U.S.C. §1

INDICTMENT

The Grand Jury charges:

I.
DEFINITIONS

1. As used herein, the term:

(a) "Person" means any natural person, firm, partnership, association, joint venture, consortium, or corporation.

(b) "Common carrier" means a person engaged in the ocean transportation of freight for hire who operates according to a fixed schedule.

(c) "United States/Europe trade" means the transportation of freight, in whole or in part by water, by common carrier between origins or destinations in the United States and origins or destinations in Europe (including the United Kingdom, Eire, Scandinavia, the Continent and countries bordering on the Baltic Sea), when such freight is routed through an Atlantic port or the St. Lawrence Seaway on the North American side and through an Atlantic (not including Iberian), North

Sea, or Baltic port on the European side.

(d) "North Atlantic trade" means the United States/Europe trade that moves via a United States Atlantic Coast port located in the range from Maine to Virginia, inclusive.

(e) "South Atlantic trade" means the United States/Europe trade that moves via a United States Atlantic Coast port located in the range from North Carolina to Florida, inclusive.

(f) "United States/Europe trade via Canada" means the United States/Europe trade that moves via a Canadian port on the Atlantic Ocean or via the St. Lawrence Seaway.

(g) "Commission" or "FMC" means the United States Federal Maritime Commission.

II.
DEFENDANTS

2. Atlantic Container Line, Ltd. ("ACL") is hereby indicted and made a defendant. ACL is a Commission-approved consortium composed of Wallenius Line (Sweden), Intercontinental Transport (Holland), Compagnie Generale Maritime (France), Swedish American Lines (Sweden), Swedish Transatlantic Line (Sweden), and Cunard S.S. Company Ltd. (United Kingdom). Atlantic Container Line Services, Ltd. ("ACLS") is a subsidiary of ACL in the United Kingdom that performs management services for ACL and has its headquarters in Southampton, England. ACL is a Bermuda-registered company. ACL is a common carrier serving the United States/Europe trade.

3. American Export Lines, Inc. ("AEL") is hereby indicted and made a defendant. For all time periods pertinent to this indictment, AEL was a subsidiary of

American Export Industries, Inc., a Delaware corporation with headquarters in New York City, and was a common carrier serving the United States/Europe trade. In March 1978, subsequent to the conduct charged, AEL was merged into Farrell Lines, Incorporated.

4. Dart Containerline Company Limited ("Dart") is hereby indicted and made a defendant. Dart is a Commission-approved joint venture of Compagnie Maritime Belge (Belgium), Bristol City Line, Ltd. (United Kingdom), and Consolidated Container Service Co. Ltd. (Hong Kong). Dart's headquarters is in Hamilton, Bermuda, and it maintains offices in Southampton, England and Antwerp, Belgium. Dart is a common carrier serving the United States/Europe trade.

5. Hapag-Lloyd Aktiengesellschaft ("Hapag") is hereby indicted and made a defendant. Hapag was established in July 1970 by merger of Hamburg-Amerika Line and Norddeutscher Lloyd. Hapag is a corporation organized under the laws of the Federal Republic of Germany, with headquarters in Hamburg. Hapag is a common carrier serving the United States/Europe trade.

6. Sea-Land Service, Inc. ("Sea-Land") is hereby indicted and made a defendant. Sea-Land is a Delaware corporation with headquarters in Menlo Park, New Jersey. It is a subsidiary of R.J. Reynolds, Inc., a Delaware corporation headquartered in Winston-Salem, N.C. Sea-Land is a common carrier serving the United States/Europe trade.

7. Seatrain Lines, Inc. ("Seatrain") is hereby indicted and made a defendant. Seatrain is a Delaware corporation with headquarters in New York City. Seatrain International S.A., a Liberian corporation and a subsidiary of Seatrain, is a common carrier serving the United States/Europe trade.

8. United States Lines, Inc. ("USL") is hereby indicted and made a defendant. USL is a Delaware corporation with headquarters in New York City. USL is since 1978 owned by McLean Securities, a corporation with headquarters in New York City. USL is a common carrier serving the United States/Europe trade.

III.
CO-CONSPIRATORS

9. Various persons who are not named as defendants participated as co-conspirators in the offense charged in this indictment and performed acts and made statements in furtherance of that offense.

IV.
TRADE AND COMMERCE

10. Ocean shipping is the primary means of transporting freight in international commerce between non-contiguous countries. Common carriers transport primarily higher value goods in less-than-shipload lots. In 1973, common carriers accounted for approximately ten percent of the tonnage moving in United States foreign commerce, but approximately sixty percent of the value of such commerce.

11. Until the mid-1960's, common carriers serving the United States/Europe trade used "breakbulk" ships. The use of breakbulk equipment necessitates unloading delivery trucks or boxcars at the pier, package by package; lifting the goods onto the ship with a sling and boom; and then

stowing each package aboard the ship. The process is repeated in reverse at the destination port.

12. In the mid-1960's, some common carriers in the United States/Europe trade began replacing their breakbulk ships with container ships. The use of container ships involves lifting a large metal box, called a container, onto a container ship by a dockside crane, and placing the container into a specially designed slot aboard ship. These containers are often loaded at the shipper's plant, sealed, and shipped by truck or train to the port. At the destination port, the container is lifted off the ship and can be shipped intact by land to the ultimate destination. The entire operation can be accomplished without handling the individual cargo inside the container. Containerized operations are preferred by many shippers to breakbulk operations because they greatly reduce the time and labor needed to load and unload a ship, facilitate faster delivery, and reduce breakage and pilferage.

13. During the time pertinent to this indictment, the seven defendant lines conducted container operations as common carriers in the United States/Europe trade. For various time periods pertinent to this indictment, certain other common carriers operated in the United States/Europe trade, including Meyer Line, Finnlines, Polish Ocean Line and Baltic Shipping Company.

14. In accordance with the Shipping Act, (46 U.S.C. §801, et seq.) the Commission regulates some, but not all, aspects of ocean shipping. In general, the Commission does not set or approve rates charged by carriers, and does not regulate entry into the ocean shipping industry. The principal regulatory function of the Commission is to approve, disapprove or modify agreements among common

carriers, pursuant to Section 15 of the Shipping Act (46 U.S.C. §814) ("Section 15").

15. Section 15 requires common carriers to file with the Commission a true copy, or if oral, a true and complete memorandum, of every agreement ("Section 15 agreement") made with any other common carrier that (1) fixes or regulates transportation rates or fares; (2) gives or receives special rates, accommodations, or other special privileges or advantages; (3) controls, regulates, prevents, or destroys competition; (4) pools or apportions earnings, losses or traffic; (5) allots ports or restricts or otherwise regulates the number and character of sailings between ports; (6) limits or regulates in any way the volume or character of freight or passenger traffic to be carried; or (7) in any manner provides for an exclusive, preferential or cooperative working arrangement. An "agreement" is defined in Section 15 to include "understandings, conferences and other arrangements."

16. Section 15 requires the Commission, by order, after notice and hearing, to disapprove, cancel or modify agreements that are in violation of the Shipping Act, unjustly discriminatory, detrimental to United States commerce or contrary to the public interest, and to approve all other agreements subject to its jurisdiction.

17. Section 15 specifies that an agreement, and any modification or cancellation of an agreement, shall be lawful only when and as long as approved by the Commission. Before approval or after disapproval, Section 15 provides that it shall be unlawful to carry out, in whole or in part, directly or indirectly, any agreement, modification, or

cancellation. Any agreement, and any modification or cancellation of any agreement, not approved by the Commission is unlawful.

18. Section 15 also specifies that agreements that are approved by the Commission and therefore lawful under Section 15 are excepted from the operation of the antitrust laws, including §1 of the Sherman Act, 15 U.S.C. §1. Absent approval by the Commission, an agreement between or among common carriers is subject to the ordinary operation of the antitrust laws.

19. Under Section 15, the Commission may approve "conference" agreements. A conference is an association of common carriers in a trade, organized pursuant to an approved Section 15 agreement, that sets rates, charges and practices for its members and publishes a common tariff that contains the rates, charges and practices which the members agree to observe. Prior to 1971, the Commission had approved, pursuant to Section 15, six conference agreements in the North Atlantic trade. These conference agreements were commonly known as: NAWFA (North Atlantic Westbound Freight Association, FMC Agreement 5850), NAUK (North Atlantic United Kingdom Freight Conference, FMC Agreement 7100), BalticEast (North Atlantic Baltic Freight Conference, FMC Agreement 7670), ContiEast (North Atlantic Continental Freight Conference, FMC Agreement 9214), ContiWest (Continental North Atlantic Westbound Freight Conference, FMC Agreement 9210) and French Eastbound (North Atlantic French Atlantic Freight Conference, FMC Agreement 7170). These agreements remained in effect for all times pertinent to

this indictment. In 1972, the Commission approved a seventh conference agreement, known as BalticWest (Scandinavia-Baltic/U.S. North Atlantic Westbound Freight Conference, FMC Agreement No. 9982), that remained in effect for all subsequent times pertinent to this indictment. During all or some of the time periods pertinent to this indictment, the seven defendant lines were members of each of these seven North Atlantic conferences. For all times pertinent to this indictment, common carriers other than the seven defendant lines were also members of some of these conferences.

20. Under Section 15, the Commission may also approve agreements known as "rate agreements." A rate agreement is an association of common carriers organized pursuant to an approved Section 15 agreement that allows the parties to set rates, charges and practices jointly. The parties to a rate agreement may or may not issue a common tariff. The "Right of Independent Action" is a provision included in many rate agreements, that guarantees each line that is a party to the agreement the right to offer a rate different from an agreed rate, after giving the other parties notice, usually forty-eight hours, prior to taking its independent action. During various time periods pertinent to this indictment, there were in existence three approved rate agreements in the United States/Europe trade: Westbound 48-Hour Rate Agreement (FMC Agreement 9427); Eastbound 48-Hour Rate Agreement (FMC Agreement 9552); and the South Atlantic/North Europe Rate Agreement ("SANE") (FMC Agreement No. 9984). For some or all time periods pertinent to

this indictment, each of these three rate agreements had a right of independent action provision. During some time periods pertinent to this indictment, ContiWest (as one party), and certain "independent" lines (those not members of a conference in a trade) -- Baltic Shipping Company, Polish Ocean Line, Finnlines and Meyer Line -- were among the parties to the Westbound 48-Hour Rate Agreement. During some time periods pertinent to this indictment, ContiEast (as one party), Baltic Shipping Company, Polish Ocean Lines, Finnlines and Meyer Line were among the parties to the Eastbound 48-Hour Rate Agreement. During some of the time periods pertinent to this indictment, AEL, Sea-Land, Seatrain, and USL were among the parties to SANE.

21. Conferences and rate agreements are created by basic agreements. Basic agreements are documents approved by the Commission that set out the geographic area that may be made the subject of agreements by the parties, and the types of agreements that the parties may reach with respect to that geographic area. Basic agreements also set out whether the parties may agree on rates for traffic moving eastbound only or westbound only (for eastwest trade routes) or in both directions. These basic agreements are quite specific in content. For example, French Eastbound is a conference of common carriers in the North Atlantic trade that permits its members to fix rates, charges and practices in the eastbound trade from North Atlantic ports in the Eastport, Maine/Hampton Roads range (both inclusive) to ports within the French Atlantic Bordeaux/Dunkirk range (both inclusive) and to interior points in France served

by those ports. French Eastbound does not permit the members to fix rates, charges and practices in any westbound trade, or in any eastbound trade covering a geographic area or areas other than that specifically described above. The other six North Atlantic conference agreements are similarly specific. Four of these conference agreements are eastbound agreements and three are westbound agreements. Each eastbound agreement has a different geographic scope from each other eastbound agreement and each westbound agreement has a different geographic scope from each other westbound agreement. If the signatories to a basic agreement wish to act in concert on subject matters that are within the scope of Section 15, but not covered by the basic agreement, they are required by law to file a new agreement with the Commission and have it approved before implementation. Rates, rules and regulations may be filed in tariffs and take effect without prior approval by the Commission, provided that they have been agreed upon by an approved conference or rate agreement.

22. Under Section 15, the Commission may also approve "Talking Agreements" or "Discussion Agreements." A talking agreement or discussion agreement is an approved Section 15 agreement that provides that the parties may jointly discuss specified subjects. Talking agreements and discussion agreements do not authorize the implementation of any agreements or understandings reached. During some times pertinent to this indictment, the Commission had approved various talking or discussion agreements that permitted the parties to discuss costs, rates, practices and traffic flows

in certain specified trades, but which also specifically stated that such talking agreements did not authorize the parties to carry out any agreements reached during such discussions except upon the prior filing with and approval by the Commission. These talking agreements included the "North Atlantic Talking Agreement" (FMC Agreement 9899), of which the seven defendant lines were the signatories; the "North Atlantic Discussion Agreement" (FMC Agreement 9989), of which the seven defendant lines and Meyer Line and Finnlines were the original signatories, and which Baltic Shipping Co. and Polish Ocean Line joined subsequently; the "United States/Europe Discussion Agreement" ("All Coasts") (FMC Agreement 10022), of which the seven defendant lines were among the signatories; and the Canadian American Discussion Agreement ("CADA") (FMC Agreement No. 10057) of which ContiEast, ContiWest, NAUK, NAWFA, French Eastbound and their members were among the signatories.

23. The Canadian American Working Arrangement (FMC Agreement No. 10090) ("CAWA"), was an approved Section 15 agreement that authorized the parties jointly to set rates, charges and practices in, among others, the United States/Europe via Canada trade if the freight originated from or was destined for a point east of the 76th meridian. The agreement authorized discussion and exchange of pricing information for freight west of the 76th meridian. The agreement was conditionally approved on October 31, 1974, and was finally approved on February 13, 1975. The agreement expired on November 30, 1975, and was cancelled on April 16, 1976. ContiEast, ContiWest, NAUK, NAWFA, French Eastbound,

and their members were among the signatories.

24. Associated North Atlantic Freight Conferences ("ANAFC") was filed with the Commission on December 30, 1971, conditionally approved on March 9, 1972, and finally approved on August 3, 1972. ANAFC authorized the signatories (eventually including each of the seven North Atlantic conferences -- NAWFA, NAUK, ContiEast, ContiWest, French Eastbound, BalticWest and BalticEast) to engage in joint tariff enforcement and to discuss and make recommendations on specified, non-ratemaking matters. ANAFC was not authorized to engage in ratemaking functions.

25. The Commission has promulgated regulations governing the conduct of parties to all Section 15 agreements that authorize the parties to fix rates, including conference and rate agreements. For example, a Commission regulation, 46 C.F.R. 537.3(a), requires that such parties file with the Commission "a report of all meetings describing all matters within the scope of the agreement which are discussed or taken up at any such meeting and shall specify the action taken with respect to each such matter. For the purpose of this part, the term 'meeting' shall include any meeting of parties to the agreement, including meetings of their agents, principals, owners, committees or subcommittees of the parties authorized to take final action in behalf of the parties." The report must be certified as to accuracy and completeness by a designated official. 46 C.F.R. 537.3(c).

26. The North Atlantic Talking Agreement (FMC Agreement 9899) was approved upon condition that the parties

report in writing to the Commission "each and every exchange, discussion or agreement transacted under the terms of" the agreement, in a "form adequate to fully inform the Commission of the topics discussed or information exchanged and the time such discussion and exchange took place." Such reports were due within 10 days of the occurrence for which reports were required. The parties to the North Atlantic Talking Agreement, the seven defendant lines, accepted this condition.

27. The North Atlantic Discussion Agreement (FMC Agreement 9989) specifically provides that the parties "will keep the Federal Maritime Commission informed with respect to all meetings held pursuant to this agreement, and that they will provide the Federal Maritime Commission with copies of data exchanged and prepared by the parties under such terms and conditions as the Federal Maritime Commission may provide."

28. The ANAFC agreement provided during all relevant time periods that, within 30 days of each meeting, ANAFC "shall file with the appropriate governmental authorities a report of such meeting, describing all matters that were discussed or considered and the accuracy and completeness of such report shall be duly certified by the Executive Director or other administrative office of the Conferences." The ANAFC agreement also provided that "[c]opies of all final reports or recommendations arising from discussions authorized hereunder shall be furnished to the appropriate governmental authorities within thirty (30) days of the date upon which such reports are circulated to the signatories."

29. In 1969, ACL, AEL, Dart, Hapag, Sea-Land and USL (or their predecessors) and Moore-McCormack Lines, Inc., a common carrier, filed with the Commission the "Transatlantic Freight Conference" (FMC Agreement 9813) also known as the "Superconference." The proposed Superconference agreement would have established one conference with authority to fix rates, charges and practices for the entire North Atlantic trade in both directions, authority the parties did not have under their existing conferences and rate agreements. The Commission set the application for hearing, but while the proceedings were still in progress, the agreement was withdrawn by the parties in 1971 with the result that the proposed Superconference was never approved by the Commission.

30. Although the Commission did approve the agreements set forth in paragraphs 19, 20, 22, 23, and 24 above and thereby authorized the curtailment in some respects of competition in the United States/Europe trade, the limited scope of these various agreements, as well as restrictions contained in them, placed limitations on the extent to which competition in the trade was foreclosed. For example, common carriers serving the United States/Europe trade could compete by offering services not offered by other common carriers. An additional example is that common carriers serving the South Atlantic trade could compete with common carriers which are parties to conferences in the North Atlantic trade by offering lower rates on cargo to or from certain inland points in the United States. In addition, the Westbound 48-Hour Rate Agreement, the Eastbound 48-Hour Rate Agreement and SANE each reserved for all parties the

right to take independent action, upon 48-hours notice, from the rates, charges, and practices agreed to by the rate agreement carriers. Thus, parties to those agreements could compete with each other by taking independent action.

31. In 1974, the total revenue in the United States/Europe trade was approximately one billion dollars.

32. The transportation of freight in the United States/Europe trade is in the interstate and foreign commerce of the United States and affects the interstate and foreign commerce of the United States.

V.

OFFENSE CHARGED

33. Beginning at least as early as 1971 and continuing into 1975, the exact dates being unknown to the Grand Jurors, the defendants and unindicted co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate and foreign trade and commerce of the United States, a felony in violation of Section 1 of the Sherman Act (15 U.S.C. §1).

34. The combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and unindicted co-conspirators, without the approval of the Commission, the substantial terms of which were to fix, raise, stabilize and maintain price levels for the shipment of freight in the United States/Europe trade.

35. In furtherance of the aforesaid combination and conspiracy the defendants and unindicted co-conspirators have done those things that they combined and conspired to do, including, among others:

(a) Established, without the approval of the Commission, committees, including a Senior Management Committee (SMC), which reported to the heads of the lines ("Principals"), and a Pricing Policy Committee (PPC), each composed solely of the seven lines, to fix rates, charges, and other factors directly affecting price levels to be charged by the seven lines for the transportation of freight in the United States/Europe trade. These committees met periodically during the course of the conspiracy including during the year 1974 and into 1975.

(b) Set and implemented through these committees, without approval of the Commission, revenue targets for the operations of the seven lines in the United States/Europe trade. These targets were known as the "Revenue Plans."

(c) Set rates, charges, and other factors directly affecting price levels, without the approval of the Commission, for the ocean transport of freight in the South Atlantic trade, by, among other methods, agreeing that rates in the South Atlantic trade would be equalized with rates in the North Atlantic trade and that each defendant line that was a party to SANL would not exercise its right of independent action.

(d) Set rates, charges, and other factors directly affecting price levels for the shipment of cargo in the United States/Europe trade via Canada when there was no approved Section 15 agreement permitting such activity.

(e) Established several related agreements between the seven lines and various independents, without the approval of the Commission, to fix rates, charges, and

other factors directly affecting price levels for the ocean transportation of freight in the United States/ Europe trade, including a fixed spread, or differential, between conference rates and the independents' rates. Some of these agreements included the "Working Objectives" and the "Restraint Program." At times, these agreements included an agreement not to exercise the right of independent action available to the parties to the Eastbound 48-Hour Rate Agreement and the Westbound 48-Hour Rate Agreement.

(f) Filed with the Commission tariffs and tariff revisions that were the product of the combination and conspiracy.

(g) Refrained from informing the Commission about the conduct set forth in (a)-(f) above, in contravention of the requirements of conference, rate, or discussion agreements, the rules of the Commission, or Section 15, by, among others, the following acts:

(i) Refrained from filing minutes of various meetings where agreements to fix rates, charges and other factors directly affecting price levels in the United States/Europe trade were reached.

(ii) Filed minutes with the Commission that were certified to be true and complete, or otherwise attested to, purporting to describe meetings held, but which minutes did not disclose discussions had and agreements reached at those meetings to fix rates, charges and other factors directly affecting price levels in the United States/Europe trade.

VI.
EFFECTS

36. The combination and conspiracy has had the following effects:

(a) Rates for the transportation of freight in the United States/Europe trade have been fixed, raised, maintained or stabilized at artificial and noncompetitive levels;

(b) Competition between and among the seven defendant lines, unindicted co-conspirators, and other persons engaged in the transportation of freight by common carrier in the United States/Europe trade has been restrained;

(c) Competition between and among conferences and rate agreements in the United States/Europe trade has been restrained; and

(d) Shippers of freight in the United States/Europe trade have been deprived of the benefits of competition possible within the framework of approved Section 15 agreements found by the Commission to be in the public interest.

VII.
JURISDICTION AND VENUE

37. The offense charged herein has been committed in part within the District of Columbia, within the jurisdiction of this Court, and within five years preceding the return of this indictment.

Dated:

A True Bill

Foreperson

Janet C. Hill

Senator METZENBAUM. Our next witness is Mr. Ray de Member, executive vice president and general counsel of the International Association of Nonvessel Operating Common Carriers.

I am happy to have you with us, Mr. de Member.

STATEMENT OF RAYMOND P. DE MEMBER, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, INTERNATIONAL ASSOCIATION OF NONVESSEL OPERATING COMMON CARRIERS

Mr. DE MEMBER. Thank you, Senator Metzenbaum. We appreciate the opportunity to testify on S. 47. Senator Metzenbaum, in the interest of time, I would be perfectly happy for my statement to be inserted into the record.

Senator METZENBAUM. Without objection, it will be inserted.

Mr. DE MEMBER. I would like to point out that nonvessel operating common carriers represent primarily shippers in ocean transportation who ship in less than container load lots. Individual shippers cannot fill by themselves a container of 30 or 40,000 pounds. NVO's consolidate that freight of several shippers, sometimes 2 or 3, sometimes 18 or 20 shippers, in a container, deliver the container to the pier, and pass on to those small shippers the benefits of the technological revolution of containerization, the savings in cost, the savings in time, and other service factors.

The NVO's in this way permit a large number of shippers of small shipments to participate in the export trade of the United States at a competitive cost and service basis when they otherwise would not be able to do so.

I would be happy to answer any questions, Senator Metzenbaum.

Senator METZENBAUM. You stated that no new antitrust immunity is necessary because the FMC grants immunity to most agreements already. Is this because current law requires the FMC to do this? Or is it simply the result of the failure of the FMC to do the job that they are supposed to do under the law?

Mr. DE MEMBER. Senator, in terms of the figures I quoted in my statement, that is really accounted for in large part because there are imposed restraints on the Commission by the Supreme Court. The Supreme Court in the so-called *Svenska*[1] case has set forth standards for the FMC's approval of agreements seeking antitrust immunity under section 15 of the Shipping Act. Those standards, which the Commission applies under the public interest factor set forth in the statute itself, are, that the proponents of agreements must show a serious transportation need or that the agreement is necessary to secure important public benefits or that it is in furtherance of a valid regulatory purpose of the Shipping Act.

Parties submitting agreements with antitrust implications for FMC approval in the vast majority of the cases do not file agreements unless they can submit evidence in support of one or more of the standards. These standards act as a restraint on the number of agreements filed with serious antitrust implications.

It is these U.S. Supreme Court approved standards which S. 47 would eliminate. Indeed, S. 47 goes much further in granting com-

[1] *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238 (1968).

plete carte blanche antitrust immunity, as has been testified to by several witnesses before me.

Senator METZENBAUM. Is there any doubt in your mind that this bill, if enacted into law, will result in substantially higher cost to the American consumers?

Mr. DE MEMBER. None whatsoever, in my mind. We have had difficulty, as it is, in fighting some agreements which contain severe anticompetitive elements under the existing law. We barely survived one rather lengthy case. We had shipper witnesses in that litigation who said they would not be able to participate in the export trade if the agreement were approved. The carriers agreement was anticompetitive, involving rates and what the NVO could receive in compensation and what he had to pay to the shipping lines.

There is just no doubt in my mind that both the shipping customers of NVO's as well as the NVO's themselves would be adversely affected by the passage of S. 47.

Senator METZENBAUM. Is there any doubt in your mind that your shippers would be very negatively impacted as far as their ability to ship their goods overseas on a competitive basis?

Mr. DE MEMBER. No doubt at all in my own mind. There has been concrete testimony to that fact.

Senator METZENBAUM. That the costs would be higher?

Mr. DE MEMBER. Yes.

Senator METZENBAUM. Therefore, you might not be able to ship as much?

Mr. DE MEMBER. Exactly.

Senator METZENBAUM. I thank you very much, sir.

Mr. DE MEMBER. Senator Metzenbaum, I would like to meet the deadline in a couple of days of submitting the changes that I would recommend on behalf of the association.

Senator METZENBAUM. That would be fine.

We will accept your statement for the record, without objection.

Senator METZENBAUM. We would appreciate your advising us because I know our staffs are going to be working within the next several days in connection with changes. So, if you have them, I would suggest that you expedite your efforts because tempus fugit.

Mr. DE MEMBER. Thank you very much, Senator.

Senator METZENBAUM. That concludes our hearing for this afternoon.

[Whereupon, at 3 p.m., the meeting was adjourned.]

[Prepared statement of Raymond P. de Member follows:]

STATEMENT OF RAYMOND P. de MEMBER

Executive Vice President and General Counsel Of

THE INTERNATIONAL ASSOCIATION OF NVOCCs

ON

S. 47

A Bill To Improve The
International Ocean Commerce Transportation System
Of The United States

FEBRUARY 17, 1983

My name is Raymond P. deMember. I am the Executive Vice President and General Counsel of the International Association of NVOCCs. Members of the Association are non-vessel operating common carriers (NVOCCs or NVOs) recognized by the Congress, the Courts, the Federal Maritime Commission and other federal agencies.

We appreciate this opportunity to submit the views of NVOCCs on S. 47.

NVOs are common carriers, who file tariffs with the Federal Maritime Commission, issue single bills of lading for through transportation on a door-to-door basis - that is from an inland manufacturer's plant to consignee's place of business at an inland point overseas.

Shippers of small shipments, that is, less-than-container load (LCL) shipments, depend on the services of NVOCCs, who consolidate these shipments of several shippers into containerloads, in order to receive the advantages of containerload lower costs and the advantages of the NVOCCs intermodal expeditious transportation service, so that these shippers can remain competitive in the United States export trade. NVOs truly make it possible for many shippers who cannot ship in containerload lots, to participate in the export trade of the United States on a realistic and competitive delivered cost and service basis.

NVOCCs are opposed to S. 47 because the bill would destroy competition in ocean transportation as a necessary correlative to strengthening conferences and the conference system, which are claimed to be facing dire emergencies if not granted carte blanche antitrust immunity far beyond the existing antitrust immunity under current shipping laws.

The underlying premises of the "emergency" are false and totally without foundation. The claim is that carriers and carrier conferences cannot obtain Federal Maritime Commission approval of antitrust immunity for agreements submitted because standards for antitrust immunity under existing shipping laws are unclear. In fact, 95 to 97 percent of all agreements submitted are approved by the FMC and receive antitrust immunity under existing law. The few agreements not approved have been validly disapproved because the parties have failed properly to justify their request for antitrust immunity.

And why should not the carriers and conferences of carriers meet the burden of justifying their sought after antitrust immunity, as required under existing shipping law? If there exists an ocean transportation problem which must be resolved by concerted action of carriers in a conference, is it too much to require that those seeking the extraordinary relief of an exemption from the antitrust laws show clearly the problem and the necessity for concerted action to resolve it, as provided in existing shipping law?

Another underlying premise is that S. 47 is needed to benefit the United States merchant marine. Indeed in the Journal of Commerce of February 11, 1983 an article states

> "...in terms of liner trade, we [i.e. U.S. merchant marine] move only about 27% of U.S. cargoes. So we do have a problem. If we ever need sealift capacity, it is just not there.
>
> To this end he [former Secretary of Transportation] supported legislation to more specifically delineate antitrust protection afforded carriers" (Journal of Commerce, p. 3A, February 11, 1983).

The connection between the strength of the U.S. merchant marine and proposed legislation to strengthen conferences of carriers, including foreign carrier members as well as U.S. carriers is difficult to fathom. It is especially difficult and incongruous when we realize that there are practically no conferences in any of the U.S. trades which have a majority of U.S. carriers. If there is a need or desire to build up the U.S. merchant marine you will not do it by granting carte blanche antitrust immunity to conferences of carriers most of which have a majority of foreign carriers as members.

It may be that Congress will want to consider augmenting the U.S. ship construction and operating subsidy program, or increase U.S. cargo preference requirements. But do not expect to strengthen the U.S. merchant marine by passing laws which threaten the existence of independent competitive lines (See testimony of Trans Freight Lines, February 15, 1983 before Senate Subcommittee on Merchant Marine on S. 1593, the predecessor bill of S. 47).

Further, Sea-Land Services, Inc., a U.S. line and one of the largest and most efficient in U.S. ocean transportation, developed and grew to its preeminence under the existing shipping laws.

One might ask then, why does Sea-Land support S. 47 now and similar bills in the past? The answer is that cartels protect the inefficent who would be eliminated in a truly competitive environment but cartels also increase the profits of the most efficient in the same non-competitive environment.

Everyone should understand one thing clearly - carriers in ocean transportation now, under exising law, Section 15, of the Shipping Act 1916, as amended, have a right to act in concert through agreements approved by the FMC, which approval carries with it exemption and immunity from the antitrust laws of the United States. As I stated above the vast majority of all agree-

ments submitted are approved by the FMC. Section 15 now has standards which require that the FMC disapprove agreements which

1) are unjustly discriminatory, or

2) operate to the detriment of the commerce of the United States, or

3) to be contrary to the public interest, or

4) to be in violation of this Act.

Further, parties seeking antitrust immunity for an agreement submitted for FMC approval, are now required to submit a written justification in support of the agreement.

S. 47 would eliminate those standards and removes any requirement of justification by the parties seeking antitrust immunity.

Last year's bill, S. 1593, in its original version, at least retained two of the standards set forth in Section 15, i.e. detrimental to U.S. commerce and the unjustly discriminatory standards (see Section 6(b) p. 17, S. Rept. #97-72. Hearings before Senate Subcommittee on Merchant Marine Sept. 21-24, 1982).

Also, the original version of S. 1593, in Section 4, Authorized Activities, stated ocean carriers may "enter into other agreements to control, regulate or prevent competition among themselves;" (emhpasis added).

S. 47 removes the standards section for FMC disapproval in Section 6 and drops the qualifying limitation "among themselves" from Section 4 authorization for "agreements controlling, regulating or preventing competition." (Sect. 4 (a)(5)).

Those seeking complete antitrust immunity, with increasing greed, want to be free of every restraint and every consequence of their anticompetitive behavior.

The removal, in S. 47, of any real standards for FMC approval of agreements resulting in exemption from the antitrust laws and with the removal of any requirement of justification, when coupled with the shift in the burden of proof from proponents of agreements to those opposing approval (Sect. 6 (e)), and with

the fact that agreements will be, under S. 47, implemented within 45 days whether or not approved by the FMC (Sect. 6(a)); and with the provision that the antitrust laws do not apply to any "agreement or activity described in Section 4 whether or not filed and approved" (Sect. 8(a)(1)); that there will be, under S. 47, no antitrust consequences or damages (even if the parties were later found by the FMC or a court not to be entitled to antitrust immunity) for that period of activity and implementation prior to the finding by the FMC or the court - all taken together will result in effective elimination of real competition in U.S. ocean transportation.

I can assure this Committee that the NVOs have had to litigate for two to three years to determine that an agreement had no justification and its true purpose was to curtail or eliminate NVO competition for small shippers freight. If that agreement had not been held in abeyance during those proceedings, NVOs and their small shipper customers would have suffered irreparable harm. Very often the true purposes of carriers agreements cannot be determined until after somewhat lengthy discovery proceeding. We had to take 18 to 20 depositions over a period of time in the litigation I am referring to. We ultimately prevailed, but under S. 47 the agreement would have been implemented during those 2 years and ultimately I believe we might not have prevailed.

I sincerely say to this Committee there is no emergency or dire need for the extreme means provided in S. 47 to promote anticompetitive activity through the grant of carte blanche antitrust immunity to the carriers. This Committee should take the time carefully to determine precisely what the problems are and how to resolve those delineated problems and should not be swayed by unrelated and unsubstantiated general contentions that S. 47 aids the U.S. merchant marine. It does not.

If the carriers have some immediate concerns, and the

lack of clear authority for conferences to establish intermodal rates has been mentioned in the past (the FMC has approvedthis authority for some conferences and not for others); or if there are time constraints related to the FMC approval process that need to be resolved (the FMC has attacked this problem even without new statutory language) then, I submit Congress may easily deal with those specific problems by brief amendments to the existing shipping laws.

I further commend to this Committee that it support a provision in H.R. 4374 (Section 18) of the 97thCongress (companion to S. 1593 and similar to S. 47) which provided for the establishment of a Presidential Commission on Deregulation of International Ocean Shipping and which included in Section 18(c) a study of the role of the antitrust laws and related subjects to international shipping. This Commission could well serve the function that was well served by the Alexander Committee in 1914 in drafting the Shipping Act of 1916, which with amendments, has served the industry well for the past 65 or more years.

We would urge that the make up of the private sector of the Commission as provided in Section 18(a)(2) of H.R. 4374 specifically include NVO representation as well as representatives of ocean carriers, shippers and ports.

We believe that the stakes are too high and the possible damage too severe for S. 47 to be enacted without the kind of informed basis that a report from such a Commission could provide.

We thank the Chairman and the members of this Committee for this opportunity to present our views of S. 47.

Respectfully,

Raymond P. deMember
Executive Vice President
General Counsel
International Association
of NVOCCs

APPENDIX

American Association of Exporters and Importers
11 West 42nd Street, New York, NY 10036 (212) 944-2230

February 17, 1983

American Association of Exporters and Importers

Comments on S.47

"The Shipping Act of 1983"

The American Association of Exporters and Importers, represents 1,400 U.S. companies - small, medium and multinational - engaged in international trade.

As major shippers we are concerned about S.47 in its present form. We recognize that past efforts of both Houses of Congress to reform maritime legislation were aimed at strengthening the U.S. liner shipping industry for both commercial and defense purposes - but S.47 over-reaches that goal by conferring strong, new anti-trust immunities not only on U.S. flag carriers but also on the large number of foreign shipping lines which, as a rule, dominate the conferences operating in U.S. trades.

We are disturbed at this considerable strengthening of the carriers' position, as we expect that the result will be inflated ocean freight costs and thus a direct weakening of U.S. export competitiveness, as well as more costly imports.

We have felt for the past ten years that U.S. Shippers Councils were necessary for the protection of the interest of U.S. shippers and the public before any legislation regarding anti-trust immunities for ocean carriers and conferences was ever considered by Congress. In this respect we are pleased to see that the Shippers Councils provisions of S.47 have been broadened to include authorization to consolidate cargo and to negotiate time-volume and service contracts with ocean common carriers. However, S.47 lacks the specific mandate for conferences to establish and maintain regular orderly communications with Shippers' Councils in their trades, and to negotiate with Shippers Councils regarding specific commodity rates, general rate levels, charges, classifications, rules, practices, or services. The absence of such a mandate in S.47 will make it highly questionable whether American shippers will be able to defend themselves against unwarranted carrier rate increases or reductions in services.

Also uncertain at this time is the nature of the regulations which would be established by the FMC to govern Shippers Councils.

In respect to the proposed anti-trust immunity for ocean carriers and conferences we are particularly concerned about the attempt in S.47 to remove the Justice Department from its oversight obligations, and to make the Federal Maritime Commission solely responsible for the policing of conferences and ocean carrier agreements. As a consequence, where the possibility of anti-trust violations exist, penalties are reduced from treble damages to simple reparation and/or minimal fines. We believe this further disincentive to proper carrier conduct is unwarranted, and ask that appropriate provisions of S.47 be amended and restored to reflect current law.

The proposed grant of oligopoly position to the carriers must be counterbalanced in the public interest. That S.47 achieves this balance, seems doubtful to us. We would prefer that the strengthening of anti-trust immunities in this bill be defeated, even at the cost of losing Shippers Councils.

Lee Greenbaum

Lee Greenbaum

President

STATEMENT OF JOHN M. FOWLER

GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION

Mr. Chairman and Members of the Committee:

It is a pleasure to appear before this Committee to discuss the Administration's position on proposed maritime regulatory reform legislation.

Regulatory reform of this industry is long overdue. The United States has more foreign commerce than any other country, but maritime regulatory policy is in disarray and often perceived as being at odds with itself. Virtually everyone concerned with the performance of the industry is dissatisfied with the current regulatory framework.

We are in the unique position of being the only major trading country to insist on pervasive government regulation of ocean carrier conduct. Unfortunately, our regulatory policies have helped create the conditions for wasteful excess capacity and other inefficiencies in the United States trades, to the detriment of both consumers and the industry itself. Our attempts to control the conduct of both U.S. and foreign carriers operating in our trades have also produced diplomatic friction with our allies.

This Administration recognizes the need to act to bring order to United States maritime policy. Our major objectives are three fold: to minimize government intervention in business; to put U.S. carriers on an equal footing with foreign carriers; and to maintain a strong U.S. merchant marine.

The Administration and the Congress have considered reforms contained in S. 1593 and H.R. 4374 in the 97th Congress and in S. 47 in the 98th Congress. There have been extensive hearings and public debate over the past year. We were able to obtain passage of reform legislation in the House, but the bill failed to reach the Senate floor in the closing days of the last Congress. That bill had broad-based support from ocean

carriers, shippers (e.g. National Industrial Transportation League, small agricultural producers in the Northwest), freight forwarders, port authorities (the American Association of Port Authorities), maritime labor and concerned Congressional committees. This support was unique for this industry and was based on the recognition that replacing the outdated provisions of the Shipping Act would bring certainty, increased efficiency, and lower costs to international ocean shipping, to the benefit of the U.S. economy as a whole, including individual consumers.

Let me briefly summarize the Administration's position on maritime regulatory reform.

Outside of the U.S. trades, closed conferences which may set prices and allocate capacity, routes, and cargo are the rule. In order to give our carriers parity, we believe that conferences in the U.S. trades should be free to organize along the lines of conferences in the rest of the world, in a way that makes commercial sense, subject to the caveats which I will discuss later dealing with abuse of conference power. These changes will enable conferences to better determine capacity, to offer stable and reliable services, to set rates and rationalize services to obtain a high utilization of their capacity. We believe that these changes will result in greater efficiencies and reduced costs within the conferences, to the benefit of shippers, carriers and the consumers or exporters of goods shipped by ocean transportation.

We believe that the scope of antitrust immunity that currently exists for the industry must be clarified. We favor a regulatory environment where prohibited practices are precisely defined, and where the exclusive remedies for the prohibited conduct are under the Shipping Act. We recognize that the clarification of antitrust immunity in the maritime industry must not permit abuse of conference market power. It is the Administration's position that the measures necessary to prevent conference abuses in U.S. trades can be specified in a manner that will allow the FMC to police conference activities in an effective and timely fashion. We

recommend statutory prohibition of clearly predatory practices, such as fighting ships, deferred rebates, and exit penalties. These prohibitions are also designed to prevent conferences from exercising their power in a fashion that would impede independent carriers from operating in U.S. trades.

In this fashion, we expect to create a certain and non-discriminatory competitive environment which will be familiar to both U.S. and foreign carriers operating in our trades. Carriers should know with certainty what conduct is acceptable. This should facilitate orderly planning and investment. The primary objective of the remaining minimal regulatory oversight is to ensure that conferences not abuse their market power to the detriment of independent carriers. The continuing presence of independent carriers and opportunities for service and time-volume contracts and independent action will preserve alternate price and service options required by shippers, and will ensure that lower transportation costs for ocean shipping services will be passed on to the users of those services.

With regard to the regulatory procedures of the FMC, we recommend continuation of filing and approval of agreements, but only so that specific predatory practices can be effectively prohibited. The approval process should be routine, consisting of a simple examination of the agreement to ensure that it does not contemplate such practices. We favor eliminating regulation of the industry based upon vague and highly discretionary administrative standards, which tend to result in prolonged proceedings and varying interpretations of what conduct is permissible. This approach would contribute to our goal of streamlining and simplifying FMC procedures, minimizing burdens and delays, and utlimately lowering transportation costs.

The Administration is, however, strongly opposed to the provision of S. 47 that would continue to require the filing of tariffs and their enforcement by the Federal government. The government has no business enforcing the prices fixed by a private producer group. Doing so is not merely unnecessary -- it introduces substantial inefficiencies in conference ratesetting and perpetuates problems of excess capacity. By legalizing free price competition, we would end this harmful government intrusion into the marketplace and allow some flexibility within the conference system as well.

U.S. carriers in particular would benefit from eliminating the tariff filing and enforcement provision, because enforcement of tariffs is more likely to be undertaken effectively against U.S. carriers, who have more documents and officials located in the United States and are more readily accessible to government investigators.

Moreover, ending filing and enforcement of tariffs would bring our practices more in line with those of our allies and major trading partners, who generally accept the conference system but do not enforce rates or require that they be filed with the government.

Our opposition to tariff filing and enforcement is consistent with our general policy favoring removal of Federal rate regulation in competitive markets. Rate deregulation has already proven to be of substantial benefit to consumers in other transportation sectors, and would provide ocean carriers with increased flexibility in establishing prices for their services.

I would also like to mention another concern of the Administration -- that S. 47 make clear that any litigation in the courts of the United States involving the Federal Maritime Commission be conducted by the

Attorney General, as indicated in the attached letter. Present law requires such, and no reason has been put forward to justify any changes. Representation of the agencies of the Federal government by the Department of Justice is in the overall interest of the government and the individual litigant.

We applaud the work of this and other committees of the Congress on this important subject, and look forward to assisting in every way possible to obtain the passage of maritime regulatory reform legislation in this Congress. Mr. Chairman, that concludes my prepared statement.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 18, 1983

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on sections 15 and 16 of S. 47, a bill "to improve the international ocean commerce transportation system of the United States." The Department of Justice strongly opposes enactment of these sections because they would undermine the prerogatives of the Attorney General to control the litigation of the United States.

Section 15 would authorize the Federal Maritime Commission (the "FMC") to assess civil penalties for violations, and provides for review, enforcement action, and compromise by the FMC. Section 16 authorizes attorneys of the Federal Maritime Commission, to appear and represent the FMC, if the Attorney General does not object, in the courts of the United States. The granting of this authority to the Federal Maritime Commission is in conflict with present law governing the authority and responsibility of the Attorney General of the United States.

Historically, the Attorney General has exercised plenary responsibility over the conduct of the legal affairs of the United States. Act of September 24, 1789, 1 Stat. 73. See also United States v. San Jacinto Tin Co., 125 U.S. 273, 279 (1888); Confiscation Cases, 7 Wall. (74 U.S.) 454, 457-58 (1868). The responsibility to conduct the litigation of the United States was first given greater statutory recognition in the act which created the Department of Justice, Act of June 22, 1870, 16 Stat. 162, and is now primarily codified at sections 516 and 519 of Title 28, which reserve the conduct of litigation involving the United States to the Attorney General and the Department of Justice "[e]xcept as otherwise authorized by law." */

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*/ 28 U.S.C. section 516 provides:

"Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

(Footnote continued on page 2)

This statutory assignment of plenary litigating authority to the Attorney General centralizes the conduct of litigation on behalf of the United States and thereby furthers a number of important policy goals. It allows the presentation of uniform positions on important legal issues, ensures that government lawyers will be able to select test cases which present the government's position in the best possible light, and gives the Attorney General authority over lower court proceedings so that government litigation will be better handled on appeal and before the Supreme Court. It provides for greater objectivity in the filing and handling of cases by attorneys who are not themselves affected litigants.

Legislation, such as section 16(f) of S. 47 seeks to bestow litigating authority on other federal agencies and departments, and therefore amend, in effect, 28 U.S.C. §516. This is inconsistent with the salutory function of the Attorney General and would permit each such agency to make its position the government's position of the day. As the Fifth Circuit has indicated in I.C.C. v. Southern Railway Co., 543 F.2d 534, 535 (5th Cir. 1976), such a result is not in the interest of the government, nor would it be well received in the courts. Moreover, the litigation of the United States is unique from that involving solely private parties. Its impact extends beyond those individuals connected with a particular lawsuit. It precedential value is significant. To ensure that the law is enforced equally and fairly, the government's litigation must be conducted with uniformity and consistency. Only the Attorney General is in a position to perform such a task.

To impose upon the Attorney General the obligation to object to attorneys for the FMC appearing in the courts of the United States

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*/ (Footnote continued from page 1)

28 U.S.C. section 519 provides:

"Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties."

See also 5 U.S.C. §3106, which provides in pertinent part:

"Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice."

is a departure from the principles set forth above. The purpose of the Department of Justice is to provide representation to the departments and agencies of the federal government, not to review whether appearances by agency attorneys is appropriate. The kinds of orders and civil penalty assessments which the FMC will issue in enforcing S. 47 if it should become enacted are not essentially different from the kinds of orders and assessments which other regulatory commissions and agencies issue in enforcing their statutes. When it becomes necessary to enforce agency orders and assessments in judicial proceedings, the Department of Justice is uniquely qualified in terms of experience and expertise in such matters. This is but part of the Attorney General's overall responsibility for the supervision and conduct of the government's litigation in the courts of the United States.

Similarly, section 15 undermines the authority of the Attorney General to conduct the litigation of the United States. Section 15 provides that the FMC may assess civil penalties for violations of the Act. We have no objection to the FMC possessing such authority and that it have power to mitigate or compromise an assessed penalty. However, we believe that section 15 should be clarified to state explicitly that any compromise authority of the FMC terminates when a particular matter is referred to the Attorney General for enforcement. The principle that one individual should have control over the government's litigation requires that all settlement authority be placed in the Attorney General once litigation is commenced.

In summary, the Department of Justice objects to sections 15 and 16 of S. 47 in that they undermine the historical prerogatives of the Attorney General of the United States. We are aware of no basis for a departure from the authority and control of the Attorney General set forth in present law. We recommend that section 16(f) be deleted and the following sections be amended to read as follows:

Section 15(c) - Assessment Procedure.

> The Commission may, after notice and an opportunity for hearing, assess each civil penalty provided for in this Act. In determining the amount of the penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. Until a matter is referred to the Attorney General, the Commission may compromise, modify, or remit, with or without conditions, any civil penalty.

Section 15(e) - Failure to Pay Assessment.

If any person fails to pay a civil penalty that has been assessed after it has become final or after the appropriate court has entered final judgment in favor of the Commission, the Attorney General may seek to recover the amount assessed in any appropriate district court of the United States. In such an action, the court shall enforce the Commission's order unless it finds that order was not regularly made or duly issued.

Section 16(f) - Enforcement of Nonreparation Orders.

In case of violation of any order of the Commission, or for failure to comply with a Commission subpena, the Attorney General or any party injured by such violation many seek enforcement by any United States district court having jurisdiction over the parties. If, after hearing, the court determines that the order was properly made and duly issued, it shall enforce the order by an appropriate injunction or other process, mandatory or otherwise.

Sincerely,

Robert A. McConnell CMC

ROBERT A. McCONNELL
Assistant Attorney General

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